1996

State of Utah v. Jeffery Gene Sprague : Brief of Appellee

Utah Court of Appeals

Rebecca C Hyde; Robert K Ljungberg; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.
Kris C. Leonard; Assistant Attorney General; Jan Graham; Attorney General; Robert Blaylock; Deputy Salt Lake District Attorney.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

Plaintiff/Appellee, : Case No. 960154-CA

v. :

JEFFERY GENE SPRAGUE, : Priority No. 2

Defendant/Appellant. :

BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION OF THIRTEEN COUNTS OF BURGLARY, ALL THIRD DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (1995); ONE COUNT OF THEFT BY RECEIVING STOLEN PROPERTY, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-6-408 (1995); AND ONE COUNT OF POSSESSION OF AN INSTRUMENT FOR BURGLARY OR THEFT, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. §76-6-205 (1995), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE WILLIAM B. BOHLING, PRESIDING.

KRIS C. LEONARD (4902)
Assistant Attorney General
JAN GRAHAM (1231)
Utah Attorney General
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

REBECCA C. HYDE (6409)
ROBERT K. LJUNGBERG (6056)
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Appellant

ROGER BLAYLOCK
Deputy Salt Lake District Attorney
231 East 400 South, Ste. 300
Salt Lake City, Utah 84111
Attorneys for Appellee

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424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Appellant

ROGER BLAYLOCK
Deputy Salt Lake District Attorney
231 East 400 South, Ste. 300
Salt Lake City, Utah 84111
Attorneys for Appellee

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a judgment and conviction of thirteen counts of burglary, all third degree felonies, in violation of Utah Code Ann. § 76-6-202 (1995) (attached in addendum A); one count of theft by receiving stolen property, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-408 (1995); and one count of possession of an instrument for burglary or theft, a Class B misdemeanor, in violation of Utah Code Ann. §76-6-205 (1995).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Where defendant was charged with burglarizing thirteen individual storage units of a storage facility on a single night, was there sufficient evidence that he entered six of the units to support his convictions on those six charges?

In assessing the sufficiency of the evidence below, an appellate court must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict. State v. Souza, 846 P.2d 1313, 1322 (Utah App. 1993); State v. Vigil, 840 P.2d 788, 792-93 (Utah App. 1992), cert. denied, 857 P.2d 948 (Utah 1993). Reversal is warranted only when the evidence is sufficiently "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he . . . was convicted." Souza, 846 P.2d at 1322 (quotation omitted); Vigil, 840 P.2d at 792-93. When dealing with circumstantial evidence, this Court must determine whether there is "sufficient competent evidence" to enable the jury to find, beyond a reasonable doubt, that defendant committed the crime. See State v. Blubaugh, 904 P.2d 688, 695 (Utah App. 1995), cert. denied, 913 P.2d 749 (Utah 1996).

2. Did the trial court properly admit limited reference to the March 29, 1995, burglary of numerous storage units in a storage facility when defendant was charged with the March 30 burglary of numerous units in the same facility?

Defendant erroneously claims that the trial court's admission of the evidence was based on Utah Rule of Evidence 404(b). However, the trial court found rule 404(b) inapplicable and instead admitted the evidence pursuant to rule 403. On appeal, the trial court's decision to admit evidence under rule 403 is reviewed for an abuse of discretion, i.e., whether the ruling went "beyond the limits of reasonability." Blubaugh, 904 P.2d at 699 (quotation omitted). Where the lower court is found to have erred, the appellate court will reverse only if the error was harmful--if, absent the error, there is a reasonable likelihood of a more favorable outcome. Id.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant text of constitutional, statutory, or rule provisions pertinent to the resolution of the issues presented on appeal is contained in or appended to this brief. Those provisions include: Utah Code Ann. § 76-6-202 (1995), and Utah Rules of Evidence 403 and 404.

STATEMENT OF THE CASE

Defendant Jeffery Gene Sprague and co-defendant Jack Christopher Jennings were charged with thirteen counts of burglary, all third degree felonies; one count of possession of an instrument for burglary or theft, and one count of theft by receiving, both class B misdemeanors (R. 8-13). The charges arose from the early morning burglaries of individual storage units within a storage facility located in West Valley City on March 30, 1995 (R. 8-13, 399-400). Defendants were tried together on all charges, having made no motions to sever any of the burglary charges (R. 385).[1]

Following a two-day trial, the jury convicted defendant as charged (R. 70-71, 75-76, 124-38, 217). The court obtained a presentence investigation report, then sentenced defendant to thirteen concurrent terms of zero-to-five years in the Utah State Prison on the burglary counts, and concurrent terms of 6 months on both misdemeanors (R. 217, 240-54, 799-800).

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[1]In a motion in limine filed immediately prior to trial, defendant sought exclusion of certain evidence and, in the alternative, severance of the charge dealing with possession of stolen property (R. 376-79) (attached as addendum B). He thereafter withdrew his severance request, and the trial court excluded the evidence (R. 383-87). Addendum B. Defendant made no other severance requests.

On appeal, defendant challenges six of the thirteen burglary convictions.

STATEMENT OF FACTS

At 2:00 a.m. on March 30, 1995, for the second night in a row, Officers Danny Benzon and Scott Ricks were driving on routine patrol past Central Self-Storage on the west side of Redwood Road in West Valley City when they noticed the gates across the facility's driveway were standing open (R. 478, 504-06, 528, 531, 548-49). The night before, they had found that the lock on the front gate and locks on several units in the facility had been cut with bolt cutters, the doors to the units had been opened, and several things had been taken (R. 502-04, 549-50). The incident had been investigated, most of the owners had been notified, all the locks--including the lock on the front gate--had been replaced, and every unit had been checked and secured before the facility closed its doors the evening of March 29 (R. 482-83, 486-91, 594-95).

The officers stopped for a closer look and found, as they had the night before, that the gate lock had again been cut and was lying on the ground by the gates (R. 504-05, 550). Officer Benzon stayed near the front gate while Officer Ricks drove around the facility in his police canine truck to determine

whether anyone was still on the property (R. 505-06, 520, 540, 542-43, 551, 553). Once again, the locks to several units had been cut and the doors opened (R. 505, 551-52, 571-74). Locks and pieces of locks were scattered on the ground (R. 565, 573). Finding no one, Ricks returned to the front gate and parked the marked truck where it was not visible by northbound traffic on Redwood Road (R. 506-08, 553-54). The officers roused the manager and his wife, who lived on-site near the front gate, then waited outside for the couple to dress (R. 506, 552-53).

While they waited, both officers noticed a Jeep Wagoneer approach northbound on Redwood Road (R. 508, 532, 553). The Jeep turned toward them across the two-lane road, crossing the center-line and proceeding through the southbound lane (R. 508, 553-54). Just before the Jeep reached the driveway of the storage facility, the officers saw it suddenly turn north and accelerate, driving in the southbound lane and, at times, partially on the gravel shoulder of the southbound lane as it drove away (R. 509-10, 554-55). The officers immediately pursued the Jeep, turning on their overhead lights once they were northbound on Redwood Road (R. 509, 555, 566).

The Jeep, still northbound in the southbound lane, drove past the field immediately north of the storage facility and

turned left into the parking lot of a strip mall just beyond the field (R. 510, 555). It pulled to a stop, and the officers stopped behind it (id.). Ricks approached the driver's side of the Jeep where he found defendant at the wheel (R. 511, 556). Before Ricks could say a word, defendant stated, "Why were you stopping me? I haven't done anything. I haven't stolen anything. I'm just here to use the ATM bank machine because there isn't one in Midvale." (R. 556-57, 566, 665-66). Ricks took defendant's identification and returned to his vehicle (R. 557-58).

Meanwhile, Benzon had approached the passenger side to observe the passenger, Jack Jennings, and to insure that there was nothing in the Jeep which might present a danger to the officers (R. 510, 512, 535). Working from the back of the Jeep to the front, Benzon shone his flashlight into the Jeep from outside (R. 512). Seeing nothing as he worked toward the front, he looked at the floorboards as he worked his way back again (R. 512-13). On the floor behind the passenger's seat he saw a computer keyboard sitting amid the trash and the clutter (R. 512-13).

About that time, Officer Charles Kirby arrived and joined Benzon on the passenger side of the Jeep (R. 513, 557-58). He

conducted the same sweep Benzon had done, and discovered on the floor next to the keyboard a lock on which the hasp had been cut (R. 513, 558, 614, 616). The officers alerted Ricks, who ordered both men removed from the Jeep (R. 513, 558, 616). As defendant stepped out, he told Ricks, "You're more than welcome to search the vehicle" and "You won't find anything" (R. 516, 557, 616).

After removing the passenger from the car and checking for warrants, Benzon walked to where Ricks had defendant (R. 514). He noticed that both suspects were nervous and scared and that their statements weren't quite the same (id.). Consequently, both men were arrested (R. 514, 559). Benzon conducted an inventory search of the vehicle, and discovered a pair of bolt cutters on the floor on the front passenger side of the Jeep and two flashlights on the front seat (R. 516-17, 543-45, 558-59). He also discovered a number of other locks and hasp pieces in the Jeep, including an overlock--a lock attached by the manager of the burglarized storage facility to the door of units belonging to people who were behind on their rent (R. 490-91, 518-22, 599). The lock sported a red label stating, "Please see manager. Unauthorized removal of this lock constitutes breaking and entering" (R. 601). Such a lock had earlier been placed by the manager, Wesley Taylor, on one of the units burglarized on March

30, but was not found at the storage facility after the burglary (R. 490-91, 599-600, 602). At trial, Taylor identified the overlock from defendant's Jeep as one of his locks and produced a key that opened it (R. 600-01).

As part of its case-in-chief, the State called on an expert in tool mark identification who explained how he was able to positively match the bolt cutters found in the Jeep to the marks on two of the locks cut at the storage facility on March 30, one of which was found lying on the ground at the scene and one of which was found in defendant's car (R. 644-49, 649-53, 662). He did not match the bolt cutters to every lock found, but explained that the more a single set of bolt cutters is used, the more the face of the cutters is changed, so that a match may only be found in items most recently cut with the cutters (R. 6588-59, 663).

The jury rejected defendant's alibi evidence and found him guilty as charged on all fifteen counts (R. 124-38).

SUMMARY OF THE ARGUMENTS

Point I: Defendant argues that the evidence is insufficient to support six of the burglary convictions because the State was permitted to use evidence relating to seven of the thirteen burglary charges to establish the element of entry as to the remaining six units, in violation of Utah Rule of Evidence

404(b). However, that rule is not concerned with the use of evidence already properly before the trier of fact. Further, the prosecutor never suggested that the evidence be used by the jury in that manner. Accordingly, the rule does not apply to defendant's claim that the State should not have been permitted to use evidence pertaining to some of the charges against him as circumstantial evidence as to the remaining charges.

The issue properly is one of relevance and prejudice under rule 403. The State's ability to use circumstantial evidence to meet its burden of proof as to any element of a charged offense is well-recognized. The fact that the circumstantial evidence relates to more than one charged offense being tried at the same time should not affect the State's ability to use the evidence. Moreover, there was sufficient evidence to support defendant's convictions regardless of whether the jury could consider the evidence establishing defendant's entry into seven units to be circumstantial evidence of his entry into the remaining six units.

Point II: The trial court's admission of limited testimony concerning the burglary of several units at the same storage facility the night before the burglaries for which defendant was charged and convicted was not based on rule 404(b). Further, the

rule is inapplicable where nothing was adduced at trial to establish defendant's involvement in the earlier burglaries. Instead, the testimony was properly admitted pursuant to rule 403 because it was relevant to the jury's determination of witness credibility. The probative value of the evidence was not substantially outweighed by any possibility of unfair prejudice where defendant was not tied to the events of the night before, there was no remarkable fact common to the events of both nights, the prosecutor did not mention the events of the night before in his closing remarks, and defendant not only told the jury twice that the previous burglaries were not at issue, but also took the opportunity to distance himself from the previous night's events by adducing evidence that he did not obtain possession of the bolt cutters until after the first burglaries had occurred.

ARGUMENTS

POINT I

THE STATE'S USE OF CIRCUMSTANTIAL EVIDENCE TO ESTABLISH THE ENTRY ELEMENT FOR SIX OF THE THIRTEEN CHARGED BURGLARIES IS NOT PROHIBITED BY UTAH RULE OF EVIDENCE 404(b); THE EVIDENCE ADDUCED BELOW, INCLUDING THE CIRCUMSTANTIAL EVIDENCE AND THE REASONABLE INFERENCES THEREFROM, WAS SUFFICIENT TO SUPPORT DEFENDANT'S BURGLARY CONVICTIONS

At trial, the owners of seven of the thirteen units involved in the March 30 burglary testified that items in their units were

either moved or missing after the burglary (R. 414, 415, 419, 420, 422, 427-28, 436, 438, 444, 447, 454, 457, 497, 499). Of the remaining owners, two could not be located before trial and, hence, did not testify (R. 479-50), and four testified that they had not been able to determine that anything had been moved or taken, despite the fact that the locks on their units had been cut off and the doors opened (R. 431-33, 440, 443, 450-51, 641-42). In his closing argument, defendant argued that "as to the people that testified that nothing was moved in their storage unit, there's no proof of an entry on those counts" (R. 766). He then identified each unit and argued that the State had not presented any evidence of entry as to those units (R. 766-67). The prosecutor, on the other hand, presented no argument as to the evidence he felt established entry into the challenged units, and responded to defendant's closing argument on the point by stating, "I suggest the only doubts that are in this case are fanciful and imaginary, and that the evidence supports all of the elements of these various crimes." (R. 779).

Defendant's argument is two-fold. First, he claims that when thirteen burglaries committed at the same time and place are charged and tried together, the State is not legally permitted to rely on evidence which establishes entry into seven of the units

as circumstantial evidence of entry into the remaining six units. Appellant's Br. at 11-15. Second, he claims that without that type of circumstantial evidence, the remaining evidence was wholly insufficient to support his conviction on six of the thirteen burglary counts. Id. at 15-16. The trial court rejected both arguments (R. 674-75, 792) (attached as addendum C).

A. Rule 404(b) Governs The Admissibility Of Other Acts Evidence, Not Its Use Once It Has Been Properly Admitted; Hence Rule 404(b) Does Not Apply To Defendant's Claim Of Error

Defendant argues broadly that this Court should not permit the State to escape its burden of establishing every element of every charge "by relying largely on evidence of other crimes" to establish one element. Appellant's Br. at 13. In support, he claims that the State cannot argue that if the jury finds defendant guilty of seven of the burglary charges it may assume his guilt of the remaining six, then relies on rule 404(b) to support his claim. Id. However, rule 404(b) has no application to this issue.

Rule 404(b) provides:

> (b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other

> purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Rule 404 is reproduced in its entirety in addendum A.) Although the defendant relies on rule 404(b) and cites to the Utah Supreme Court's latest explanation of the rule, State v. Doporto, 308 Utah Adv. Rep. 18 (Utah 1997), this is not a rule 404(b) issue for several reasons.

First, defendant does not challenge the admissibility of the evidence establishing entry into seven of the charged units--only its use. Defendant seeks to limit the jury's use of evidence which is already properly before it. However, once evidence has been properly admitted, defendant must resort to avenues other than rule 404(b) to limit its use because the plain language of the rule applies only to the admissibility of the evidence, not its use once it is otherwise properly admitted. Defendant did not challenge the admission of the evidence that seven of the units were entered, and he failed to take any proper measure to limit the use of the evidence once it was properly admitted: he did not request a cautionary or limiting instruction to the jury, seek severance of the six challenged charges, or otherwise

attempt to restrict use of the evidence.[2] He cites no authority for expanding the scope of rule 404(b) beyond the admissibility of evidence, and the State has found none.

Second, the evidence of entry into the seven units was not admitted for the prohibited purpose of establishing defendant's propensity to commit criminal acts--it was properly admitted as part of the State's case-in-chief as evidence directly relating to seven of the thirteen burglaries for which defendant was on trial. The State did not use it for the prohibited purpose of establishing defendant's propensity to commit this particular type of burglary; in other words, the State never claimed that if the jury found defendant had committed any of the burglaries, it could assume he had committed the remaining burglaries. See Doporto, 308 Utah Adv. Rep. at 22. In fact, the State never argued to the jury that evidence that seven units were entered

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[2]When he brought up the issue prior to trial, defendant merely requested that the court

> make a ruling . . . that we not talk in terms of 13 burglaries, that we somehow limit them. Because I think it's prejudicial to our clients to talk about 'X' number of burglaries there if there's not going to be any evidence forthcoming sufficient to establish that those units--each individual unit was burglarized."

(R. 372).

might generate an inference that the remaining six units were entered. Accordingly, rule 404(b) has no application to this issue.

Additionally, the fact that neither this issue nor the relevant facts upon which it turns were present in any of the cases cited by defendant renders his argument unpersuasive. For example, in United States v. Krezdorn, 639 F.2d 1327, 1330 (5th Cir. 1981), defendant was convicted of four counts of forgery after a trial in which the State introduced evidence of thirty-two uncharged acts of forgery together with expert testimony which tied defendant to the charged and uncharged acts. The forgeries were committed on two or more "separate occasions." Id. at 1329. The court held that the uncharged acts of forgery were erroneously admitted in violation of rule 404(b). Id. at 1332. In United States v. Eichman, 756 F.Supp. 143, 145 (S.D.N.Y. 1991), defendant was charged with and tried for a single count of burglary, and the State freely admitted it did not contend, let alone prove, that defendant entered within the four walls of the subject building. Instead, the State attempted to establish the requisite element of entry by proving that defendant entered into "an area of or related to a building to which the public has been or can be denied access"--i.e., the

roof of the building. Id. at 145, 147. The court rejected the State's attempt to expand the entry element of burglary. Id. at 148-49.[3]

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[3]See also State v. Doporto, 308 Utah Adv. Rep. 18 (Utah Jan. 17, 1997) (testimony from victims of defendant's sexual misconduct years prior to the single charged act of sodomy on a child was erroneously admitted in violation of rule 404(b) where the evidence related to an admitted fact, there was no remarkable fact shared by the prior conduct and the charged crime, neither offense showed a unique or unusual modus operandi, and the acts were merely similar and shared features common to many such cases); State v. Featherson, 781 P.2d 424 (Utah 1989) (finding error in admission of evidence of prior convictions of rape and aggravated assault as there was no relationship between those convictions and the current charges of aggravated sexual assault and aggravated burglary; similarity in defense presented in all the offenses does not relate to modus operandi); State v. Tarafa, 720 P.2d 1368 (Utah 1986) (finding prosecutorial misconduct in the prosecutor's argument to the jury that defendant's prior burglary conviction demonstrates his propensity to commit the charged theft); State v. Saunders, 699 P.2d 738 (Utah 1985) (reversing the trial court's denial of defendant's motion to sever where evidence that defendant was a prison inmate when he committed the offense giving rise to charges of burglary, theft, possession of a firearm by a restricted person, and being a habitual criminal was relevant to only two of the charges and would be inadmissible under rule 404(b) in a separate trial on the other charges); State v. Forsyth, 641 P.2d 1172 (Utah 1982) (approving the use of testimony from defendant's prior investors concerning representations made by defendant accused of theft by deception as relevant to prove some fact material to the crime charged--common plan or scheme); Longstreth v. State, 832 P.2d 560, 564 (Wyo. 1992) ("the State did not present either direct or circumstantial evidence of unlawful entry"--instead, it sought the Court's sanction for proving a single charge of burglary by establishing that a building was burned, and permitting that to give rise to the inference that defendant had no permission to set the fire and therefore entered the building unlawfully).

That circumstantial evidence may be used to prove guilt is well-established. See State v. Blubaugh, 904 P.2d 688, 694 (Utah App. 1995) (acknowledging that guilt may be based solely on circumstantial evidence), cert. denied, 913 P.2d 749 (Utah 1996); see also State v. Span, 819 P.2d 329, 332 (Utah 1991) (upholding arson conviction based entirely on circumstantial evidence). Clearly, such evidence, and the reasonable inferences therefrom, may be used to meet the State's burden of establishing guilt beyond a reasonable doubt, and the determination of weight and sufficiency is then left for the jury. Accordingly, to the extent the jury regarded the evidence establishing entry into seven of the units as circumstantial evidence bearing on the entry element of the remaining six units, the use of the evidence would not "circumvent" or "avoid" the State's duty to establish the element of entry as to all charged burglaries, as defendant asserts. Appellant's Br. at 13-14. Indeed, under the facts of this case--a series of thirteen burglaries committed in a single storage facility at the same time and in the same manner tried together in a single trial--such circumstantial evidence is readily available, uniquely appropriate, and compelling. It does not change the State's ability to use the circumstantial evidence to meet its burden as to any of the charged offenses.

B. The Evidence Was Sufficient To Support Defendant's Convictions

The question becomes whether the evidence adduced was sufficient to support the convictions. Defendant claims that the remaining evidence--that the locks on the six challenged units were cut and the doors were open--is insufficient to establish that the units were entered, as is required for a burglary conviction. Appellant's Br. at 15-16.

In assessing the sufficiency of the evidence below, an appellate court must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict and will not reverse unless the evidence is sufficiently "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he . . . was convicted." State v. Souza, 846 P.2d 1313, 1322 (Utah App. 1993) (quotation omitted); State v. Vigil, 840 P.2d 788, 792-93 (Utah App. 1992), cert. denied, 857 P.2d 948 (Utah 1993). When dealing with circumstantial evidence, this Court must determine whether there is "sufficient competent evidence" to enable the jury to find beyond a reasonable doubt that defendant committed the crime. See Blubaugh, 904 P.2d at 695.

Defendant challenges only the "entry" element of six of the charged burglaries. Assuming, arguendo, that the jury should not have considered the evidence of entry into the unchallenged seven units when determining whether the six challenged units were entered, there is still sufficient evidence from which the jury could reasonably have inferred that the units were entered. Defendant does not contest the State's proof that the burglar cut the locks on each of the six units, then opened each of the doors with the intent to commit theft. He also fails to contest the fact that none of the affected owners knew him, and none of them gave him permission to open or enter their unit. The State adduced evidence that there were no lights in the affected area of the facility, and that none of the units had lights in them (R. 481-82); in other words, entry was likely necessary in order for the individual to see what was inside each unit. Finally, the evidence establishes that defendant was "obviously attempting to turn into the driveway" of the facility at 2:00 a.m. and that he was not renting a storage unit at that facility (R. 506-08, 550, 553-55, 603). From this evidence, it is reasonable to infer that the burglar did not know what was in any given unit before he opened it, that, after taking time to open them, he looked through each of the six units to determine what, if anything, he

would steal, that he was returning to the facility to burglarize additional units, and that he was so bent on profiting from his actions that he gave the unlit units more than a cursory review from the doorway, even if that involved merely walking far enough into a given unit to shine his flashlight on whatever was stored in the back. Accordingly, there was sufficient competent evidence giving rise to reasonable inferences which would permit the jury to reasonably find the required entry into the challenged units.

On the other hand, it is not reasonable to infer, as defendant suggests, that the burglar went to the trouble of breaking into the storage facility under the cover of darkness, finding a relatively secluded area, cutting numerous locks, and looking into the units, only to give the dark units a cursory review from outside the door to determine whether each unit contained anything that might reward his efforts. While the contents of these six units might not have warranted the disruptive searching evident in some of the other units, it is unreasonable to believe that defendant, having taken the time and effort to open these units, being bent on finding items he could use or profit from, and apparently having nothing but a flashlight with which to illuminate the contents of each unlit

unit, would not at least step into the unit and look at the things in the back to be sure he was not missing anything before moving to the next unit. Even at best, defendant's interpretation is no more legitimate than the one advanced above, requiring rejection of his argument. State v. Bradley, 752 P.2d 874, 877 (Utah 1985) ("The existence of . . . conflicting inferences does not warrant disturbing the jury's verdict.").

However, as established previously, the jury was in fact permitted to include in its deliberations on the six challenged units the evidence relating to the manner and circumstances of the invasion of the remaining seven units. Further, the jury had before it the fact that the six challenged units (highlighted below) were randomly interspersed among the burglarized units: 307, 308, 309, 451, 452, 453, 455, 456, 458, 706, 707, 708, 711. This provided additional evidence relating to the pattern and consistency of the thief's actions. Not only did it establish a repetitive pattern of cutting locks, opening doors, and entering unit after unit to look for worthwhile objects--which pattern the jury could reasonably have inferred was followed for every unit, not just seven of them--but it demonstrated that defendant did not take only what he could see from the doorway of the units. Instead, he "rummaged" through the interior of some units, taking

things he apparently deemed to be useful either to himself or to someone who might pay for them. This renders it highly unlikely that he merely stood at the doorway of these six units and, based on that cursory view of the units' contents, decided that none of the units harbored anything of use to him.

Moreover, the jury found the evidence and reasonable inferences therefrom to be sufficiently persuasive to warrant conviction in the face of instructions detailing the elements and the State's burden of proof as to each separate charge, and after hearing defendant specifically argue in closing that the State had failed to meet its burden on the element of entry as to the challenged units (R. 151, 170-82, 766-67). Accordingly, there was sufficient competent evidence before the jury to permit a finding beyond a reasonable doubt that defendant committed the challenged burglaries. Cf. Blubaugh, 904 P.2d at 695.

POINT II

TESTIMONY CONCERNING THE MARCH 29 BURGLARIES WAS NEITHER ADMITTED NOR USED PURSUANT TO RULE 404(b); INSTEAD, THE EVIDENCE WAS PROPERLY ADMITTED PURSUANT TO RULE 403; EVEN IF ITS ADMISSION WAS ERRONEOUS, IT WAS HARMLESS IN THIS CASE

A. Introduction

Over defendant's objection, the trial court permitted the State's witnesses to make limited references to a similar

burglary of several units in the same area of the same storage facility the night before the ones with which defendant was charged.

Five of the State's witnesses made some reference to the March 29 burglaries. The first was Cindy Beard, owner of unit #711, which was burglarized on both nights. She provided very emotional testimony concerning several large items belonging to her family which were taken on the second night. (Her relevant testimony is attached as addendum D.) In the course of her testimony, she did what the prosecutor predicted in his opening statement that she would do: compare two photographs of the contents of her unit to identify a number of the items stolen in the second burglary (R. 403, 455-57). Addendum D. One photograph was taken after the March 29 burglary, and the other was taken after the March 30 burglary (id.).

The second witness who mentioned the earlier burglaries was Marilyn Taylor, who managed the storage facility with her husband. She explained what happened on the 29th after the police woke them up, identified on a picture of the facility the number and location of the units involved in the first burglary, and noted that on both nights the burglarized units were in an area farthest away from the managers' home (R. 482-86). (Her

relevant testimony is attached as addendum E.) She then explained that if the victims of the first burglary failed to appear at the facility that day, the witness and her husband put locks on those units and made periodic checks throughout the day to ensure that every unit was locked (R. 488-90). Addendum E.

The third and fourth witnesses making reference to the earlier burglaries were Officers Danny Benzon and Scott Ricks, who discovered the burglaries on both nights. Each officer briefly explained what he did on March 29, then went into detail on his activities of the 30th (R. 502-04, 549-50).[4] (Their relevant testimony is attached as addenda F and G, respectively.)

The final State's witness to address the March 29 burglaries was Wesley Taylor, manager of the facility. He explained that in the six years he'd been with the facility, there had been no burglaries until March 29 and 30, that after the March 29 burglaries he made several inspections of the locks on all the units, and that everything was securely locked when he closed at the end of that day (R. 592-95). (His relevant testimony is

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[4]Officer Benzon made one additional reference to the March 29 burglaries on re-direct examination, clarifying a point defendant had raised for impeachment purposes concerning the officer's preliminary hearing testimony (compare R. 528-29 and 540-41).

attached as addendum H.) He also used the pictures taken of Cindy Beard's unit after each burglary to verify his testimony that he had seen the contents of the unit on both days and knew that several items were taken in the March 30 burglary (R. 598-99). Addendum H.

The lower court found rule 404(b) to be inapplicable to this situation (R. 786-88). Despite this, defendant claims that the trial court's decision to admit the testimony concerning the March 29 burglaries was actually based on rule 404(b) and that such an admission was erroneous. Appellant's Br. at 17-18. He argues that the evidence should have been excluded under rule 404(b) because it was not required to explain the context and circumstances of the March 30 burglaries, it could not appropriately demonstrate a common scheme or modus operandi, and it was not sufficiently probative of the identity of the March 30 thief. Id. at 19-25. Further, he claims that even if the evidence was admissible under rule 404(b), it should have been excluded under rule 403 because its probative value was substantially outweighed by its prejudicial effect. Id. at 25-28.

B. The Trial Court Denied Defendant's Motion To Exclude The Evidence After Finding Rule 404(b) Inapplicable To This Situation

Although defendant objected to evidence concerning the March 29 burglaries early in the trial, he was unable to make his record until after closing arguments were given (R. 391-93, 468-70, 673-76, 785-87) (these pages are attached as addendum I). At that time, the trial court made the following ruling:

> THE COURT: . . . First of all I don't think we're talking about prior bad acts because there is no indication that I can think--it was a complete denial that the defendants had anything to do with the activities of the 29th.
>
> The circumstances and the pattern of those activities seem to me to be relevant in allowing a full development of the case, and to exclude that would be to eliminate that opportunity. In addition to that, it would seem to me that there was a relationship that could be established between the earlier activity and the present activity that had some probative significance to the alleged activities of defendants on the 30th.
>
> And finally, in looking at the way in which the effect of that evidence was either prejudicial as against probative, I'm certain that [the prosecutor] didn't do it intentionally, but my own reading of the evidence was that it probably helped the defendants more than it hurt them, simply because the credibility of their activities the night before, particularly with respect to Mr. Jennings, would have made it more difficult to believe that he had anything to do with the activities of the night after that.
>
> I think that's what [the prosecutor], I think, is saying. I don't think he said he did it intentionally, but that's kind of how that came out. So I don't think there's a prejudice as a result.

(R. 787-88) (the full ruling is attached as addendum J). In other words, the trial court rejected rule 404(b) as being inapplicable to the question of the admissibility of the evidence, ruling instead that the testimony had probative value and that the probativeness was not substantially outweighed by the potential for undue prejudice, pursuant to rule 403.

C. Rule 404(b) Does Not Govern The Question Of The Admissibility Of Testimony Concerning The March 29 Burglaries

That rule 404(b) does not apply to this issue is clear from the record. At the time of trial, it had not been determined whether defendant was connected to the acts of the 29th. Absent a sufficient connection, the evidence can't be used in the manner prohibited by the rule: because defendant committed the March 29 burglaries, he must have committed the March 30 burglaries. Therefore, the testimony would not be governed by rule 404(b). Utah R. Evid. 404(b); 2 J. B. Weinstein & M. A. Berger, Weinstein's Evidence, 404-61 to 404-62 (1994) [hereinafter "Weinstein's Evidence"] (although the prior bad act need not have resulted in formal charges or a conviction, there must be some "proof that the defendant was sufficiently connected to the other offense" to warrant its use against defendant at trial).

Although the prosecutor originally intended to try to tie defendant to the earlier burglaries and to establish a common plan or scheme, this strategy was halted before trial ever began. Immediately prior to trial, defendant submitted a motion in limine to exclude any evidence regarding the fact that the keyboard found in his Jeep was related to the March 29 burglaries (R. 376-78). Addendum B. He anticipated that the State would use the keyboard to establish his possession of stolen property, and, because he had only learned that morning that the State had a witness who could potentially tie the property to the March 29 burglaries, sought to have the keyboard excluded from evidence or, alternatively, to have the possession charge severed and tried separately (R. 376-79). Addendum B. The prosecutor responded that he would not use the keyboard for the possession charge, but intended to offer it

> just for purposes of identification, tying them [the burglaries] together with a common scheme or plan of the night before . . . . The locks are cut and there are items taken. One of the items taken is this keyboard . . . . This merely ties them together and shows, okay, he's in possession of property that was taken the night before, and I think that shows that there was a common scheme on both nights to go cut the locks, take the property.

(R. 379-80). Addendum B. Defendant thereafter withdrew his request for severance of the count (R. 383), but prevailed on his

motion to exclude the evidence linking the keyboard with the March 29 burglaries (R. 387). Addendum B. The trial court based its ruling solely on the State's discovery violation (id.).

Having lost the ability to tie defendant to the March 29 burglaries by establishing his possession of property taken in the course of those burglaries, the State's ability to establish a common plan or scheme necessarily abated, as the State did not adduce, and presumably did not possess, any other evidence that defendant was involved in the March 29 burglaries. See Weinstein's Evidence, 404-61 to 404-62 (there must be some "proof that the defendant was sufficiently connected to the other offense" to warrant its use against defendant at trial). The record does not show any formal charge or conviction of defendant for the March 29 burglaries, and, as the trial court recognized, defendant "completely denied doing it" (R. 787). Moreover, at no time after the court made the above pre-trial ruling did the prosecutor demonstrate any further intent to establish a common plan or scheme or to prove defendant's responsibility for the earlier burglaries, even when justifying his use of the March 29 testimony while making the post-trial record of defendant's objection to that evidence (R. 784-88). Addendum I.

Accordingly, where the acts of the 29th were not tied to defendant, rule 404(b)'s prohibition against admitting prior acts evidence to prove the character of an accused has no application. Utah R. Evid. 404(b); Weinstein's Evidence, 404-61 to 404-62.

D. The Trial Court Properly Admitted The Evidence Pursuant To Rule 403 Because It Was Relevant And Its Probativeness Was Not Substantially Outweighed By Any Danger Of Unfair Prejudice

The question, as defendant originally argued it below, is one of relevance and probativeness (R. 468-69). The trial court correctly resolved it in favor of admission. See United States v. Mihm, 13 F.3d 1200, 1204 (8th Cir. 1994) (the admissibility of evidence regarding marijuana growing in a place other than that charged and not strongly linked to defendant was a question of relevancy, not prior acts). Under rule 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." (The rule is reproduced in addendum A.) On appeal, the trial court's decision to admit evidence under rule 403 is reviewed for an abuse of discretion, i.e., whether the ruling went "beyond the limits of reasonability." State v. Blubaugh, 904 P.2d 688, 699 (Utah App. 1995), cert. denied, 913 P.2d 749 (Utah 1996) (quotation omitted). Where the lower court is found to have

erred, the appellate court will reverse only if the error was harmful--if, absent the error, there is a reasonable likelihood of a more favorable outcome. Id.

The fact that the trial court did not expressly mention rule 403 in making a record of its decision to admit the evidence does not change the fact that it employed the appropriate analysis under the rule, making findings of relevance and weighing the probativeness of the evidence against the potential for prejudice (R. 787-88). Addendum J. State v. Troyer, 910 P.2d 1182, 1191 (Utah 1995) (failure to label an analysis as relating to rule 403 does not change the fact that the trial court employed the rule to make its decision); see Hall v. Process Instruments & Control, Inc., 890 P.2d 1024, 1027 (Utah) (the exact language or terminology used is not conclusive as to whether the trial court employed the correct analysis), aff'd, 890 P.2d 1024 (Utah 1995).

The record supports the trial court's determination that the probative value of the evidence was not substantially outweighed by the potential for prejudice. Regardless of who committed the March 29 burglaries, their occurrence explained, in large part, the actions, knowledge and credibility of certain witnesses in this case, rendering the evidence relevant and admissible.

The references made by each of the State's witnesses who mentioned the March 29 burglaries were relevant to each witness' subsequent actions on March 29 and 30 and/or to the witness' credibility. The pictures used by Cindy Beard were highly relevant to the case as they corroborated her testimony about what was taken from her unit, demonstrated the existence and the size of the items, and verified her claim that the items were taken during the March 30 burglary. The mere fact that one picture was taken as a result of the March 29 burglary does nothing to associate defendant with that uncharged burglary. The limited testimony concerning the March 29 burglary which the witness gave in conjunction with the pictures was relevant to explain why she happened to have a photograph of her unit's contents taken the day before the charged burglary occurred, and to verify why she was so certain that the items were removed during the March 30 burglary. Her limited discussion of the earlier burglary did not tie defendant to the offense or detail any of the similarities in the events of the two nights. Accordingly, the probative value of the evidence was not substantially outweighed by any prejudice from the witness' testimony.

Marilyn Taylor's testimony about the March 29 burglaries was relevant not only because it helped to establish that the March 30 burglaries in fact occurred despite the fact that a corresponding lock was not discovered for every unit charged, but because it was probative of the witness' credibility, explaining why she was able to specifically remember her actions immediately before and after the March 30 burglaries, despite almost six years of managing the facility, and why she was so certain that each of the charged units had been securely locked before the March 30 burglaries occurred. Although the testimony established some of the similarities in the events of both nights, it did not tie defendant to the earlier burglaries or inflame the passions of the jury against defendant.

As noted in the prosecutor's opening statement, testimony from the two investigating officers concerning the March 29 burglaries helped to explain why the officers acted as they did on March 30 (R. 400)--specifically why the open gate got their attention, why they acted so quickly upon seeing it, and why one of them immediately drove through the facility. It was also probative of the officers' credibility inasmuch as it demonstrated that they were not confusing their actions regarding the March 30 burglaries with their actions of the previous night.

Again, the testimony necessarily presented some of the similarities in the burglaries of both nights, but the mere existence of similarities does not establish that defendant was involved on both nights. This is clear from the testimony that during April, while the defendant was in jail, the facility was again burglarized by someone using bolt cutters to cut off numerous locks (R. 609).

The references made by Wesley Taylor to the March 29 burglaries were directly probative in helping the jury judge the witness' credibility because they established that he was not confusing the March 30 burglary with any other burglary the facility had suffered and that he had reason to be certain about the charged units being secure immediately before the March 30 burglaries. Further, his use of the photographs, the corresponding explanation as to his familiarity with the contents of Cindy Beard's unit, and the fact that several items that had been there after the first burglary were missing after the second, provided corroboration for Cindy's testimony.

Overall, the evidence admitted regarding the March 29 burglaries helped to establish that the burglaries in fact occurred on March 30 and was relevant to the jury's determination of witness credibility. Any prejudicial value inherent in the

evidence necessarily stemmed from its probative value in supporting or explaining the State's case against defendant and strengthening the credibility of the State's witnesses. However, the mere fact that evidence is prejudicial does not render the evidence inadmissible. State v. Ramirez, 924 P.2d 366, 369-70 (Utah App. 1996).

Further, the limited nature of the testimony acted to reduce any possible prejudice to defendant. Although it permitted the jury to hear limited details of the first burglaries, it did not establish either the presence or the involvement of defendant in those acts, and it did not highlight any remarkable or unusual fact or circumstance common to both nights. The trial court excluded the only evidence which might have tied defendant to the earlier burglary (R. 387), and nothing adduced by the State provided the identity of the individuals involved in the March 29 burglaries. See First Gen. Servs. v. Perkins, 918 P.2d 480, 485 (Utah App. 1996) (challenged evidence relating to a "suspicious and intentionally set fire" was properly admitted where the evidence was limited "so as to reduce its possible prejudicial effect" and the trial court excluded evidence of defendant's involvement in the fire). Even the bolt cutters, expressly tied

to the March 30 burglaries, were not tied to the earlier burglaries.

Moreover, defendant in fact took advantage of the testimony to distance himself from the March 29 burglaries and, thereby, lend more credibility to his claim of innocence for the March 30 burglaries, as was suggested by the trial court. Defendant did not provide alibi testimony similar to that of his co-defendant, which put the co-defendant somewhere else at the time of the March 29 burglaries. Instead, defendant offered the testimony of his father-in-law, who owned the bolt cutters found in defendant's Jeep, that the bolt cutters were locked in his tool box until he gave them to defendant sometime during the day of March 29th (R. 697-703); in other words, defendant had no bolt cutters with which to cut the locks until after the burglaries had occurred in the early morning hours of March 29.

Any potential prejudice which might have arisen from the evidence was further mitigated in this case by the jury instructions directing the jury to decide defendant's guilt or innocence of the March 30 burglaries, explaining the State's burden of proof as to each element of each offense, and identifying each of the individuals victimized in the March 30 burglaries (R. 151, 170-82). In addition, defense counsel

stressed to the jury in both his opening and closing remarks that the burglaries occurring on March 29 were not charged and were not at issue (R. 407, 762). The only mention of March 29 in the prosecutor's closing remarks was an indirect reference to the fact that several items in unit #711 were there the day before the charged burglaries but were gone the next day, and that the owner, Cindy Beard, was upset after the first night and angry after the second (R. 753) (attached as addendum K). Consequently, under the circumstances of this case, even assuming there was some danger of unfair prejudice, that danger did not substantially outweigh the probative value of the evidence, and the trial court's admission of the evidence was not an abuse of discretion. See State v. Smith, 927 P.2d 649, 654 (Utah App. 1996) (where evidence of a manslaughter charge was probative of motive and intent regarding two other charged offenses, its probative value outweighed any natural prejudice arising from the evidence).

E. Even Assuming Error, Remand Is Not Warranted Because The Error Was Harmless

Finally, even if the testimony should have been excluded, its erroneous admission would be harmless. There was substantial evidence supporting defendant's convictions of the March 30

burglaries independent of the earlier burglaries, including: his possession the night of the charged burglaries of bolt cutters conclusively tied to a lock found at the facility and cut in the March 30 burglaries and to a lock found in defendants Jeep and belonging to the storage facility; his possession the same night of several locks established to have been on some of the units burglarized on the 30th; his aborted turn into the facility followed by his illegal driving on the wrong side of the road; and his voluntary, unprovoked statements upon being stopped by the officers that "I haven't stolen anything" and "Mr. Jennings had nothing to do with it" (R. 539-40, 556, 566, 669-70). Consequently, there is no reasonable likelihood that the jury would have believed defendant's alibi defense and acquitted him absent the testimony about the March 29 burglaries. See State v. Hamilton, 827 P.2d 232, 240 (Utah 1992) (any error in admission of evidence in violation of rule 403 was harmless where there was no substantial likelihood that the outcome would have been different absent admission of the evidence).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions.

RESPECTFULLY SUBMITTED this 21st day of May, 1997.

JAN GRAHAM
Attorney General

KRIS C. LEONARD
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed by first class mail, postage prepaid, to Rebecca C. Hyde and Robert K. Ljungberg, Salt Lake Legal Defender Assoc., attorneys for appellant, 424 East 500 South, Ste. 300, Salt Lake City, Utah 84111, this 21st day of May, 1997.

ADDENDA

Addendum A

76-6-202. Burglary.

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

History: C. 1953, 76-6-202, enacted by L. 1973, ch. 196, § 76-6-202.

Cross-References. — Agreement to commit burglary, conspiracy, § 76-4-201.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 402 [Rule 403]. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977) (surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314 (Utah 1979); State v. Johns, 615 P.2d 1260 (Utah 1980); Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

Compiler's Notes. — The bracketed reference to "Rule 403" in the Advisory Committee Note to Rule 403 was inserted because Rule 402 does not refer to "unfair prejudice" and Rule 403 appears to be the correct reference.

Cross-References. — Admissibility of evidence, Rules of Civil Procedure, Rule 43(a).

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Amended effective October 1, 1992.)

Addendum B

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900791

JACK CHRISTOPHER JENNINGS,

DEFENDANT,

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900792

JEFFREY SPRAGUE,

DEFENDANT.

BEFORE THE HONORABLE WILLIAM B. BOHLING, JUDGE

NOVEMBER 14, 1995

REPORTER'S TRANSCRIPT ON APPEAL

960154-CA

THE COURT: DO YOU PLAN ON PUTTING EVIDENCE ON WITH RESPECT TO EACH ONE OF THE 13 STORAGE--

MR. BLAYLOCK: YES. SOME EVIDENCE MAY COME FROM MANAGERS THERE, AND MOST OF THE EVIDENCE WILL COME FROM THE INDIVIDUALS WHOSE STORAGE FACILITIES, THOSE WHO WERE-- RENTED STORAGE FACILITIES.

THE COURT: ARE YOU GOING TO PRESENT EVIDENCE AS TO EACH OF THE 13 THAT STATE THAT THERE HAS BEEN ENTRY OTHER THAN JUST THE FACT THAT THE DOORS WERE OPEN?

MR. BLAYLOCK: WE'RE TALKING ABOUT CIRCUMSTANTIAL EVIDENCE. OKAY?

THE COURT: OKAY.

MR. BLAYLOCK: AND WE DON'T HAVE A VIDEO TAPE SHOWING SOMEBODY GOING INTO THESE STORAGE FACILITIES, BUT WE DO HAVE EVIDENCE THAT ITEMS HAVE BEEN TAKEN FROM AT LEAST ONE OF THOSE.

THE COURT: ONE OF THE THIRTEEN?

MR. BLAYLOCK: AT LEAST ONE, BECAUSE THE DEFENDANTS WERE IN POSSESSION-- THE VEHICLE IN WHICH MR. SPRAGUE AND MR. JENNINGS WERE RIDING HAD A COMPUTER BOARD AND THEY THINK THAT'S-- I JUST RECEIVED A MOTION IN LIMINE TODAY WITH REGARDS TO THAT COMPUTER BOARD. SO I GUESS WE NEED TO DISCUSS THAT.

THE COURT: I HAVEN'T SEEN THIS.

MR. ANDERSON: AND, YOUR HONOR, AS FAR AS

PROPERTY BEING TAKEN, I KNOW THAT THERE WERE SOME STORAGE FACILITIES, AND I'M LOOKING AT A PROPERTY ENTRY WHERE THE OFFICERS OBVIOUSLY CALLED THE OWNERS, AND THE OWNERS, THEY CAME DOWN AND LOOKED THROUGH THE FACILITIES. AND I REMEMBER ON SEVERAL ENTRIES THE NOTATION WAS "NO PROPERTY TAKEN."

IT'S OUR POSITION THAT IN THIS SITUATION, THERE IS INADEQUATE-- THE STATE DOES NOT HAVE ADEQUATE EVIDENCE TO SHOW THAT THERE WAS THE ENTRY UNDER 76-6-201, UNDER THE BURGLARY STATUTE IN THE WAY "ENTER" IS DEFINED TO QUALIFY AS BURGLARY, AND THAT THOSE CASES, UNLESS THE STATE HAS EVIDENCE BEYOND WHAT WE HAVE BEEN PRESENTED WITH OR THE INDIVIDUALS COMING TO TESTIFY, I WOULD ASK THE COURT TO NOT ALLOW THE STATE TO TALK ABOUT THOSE COUNTS, INITIALLY, IF THEY DO NOT HAVE ANY MORE EVIDENCE SIMPLY OTHER THAN THE FACT THAT THE LOCK WAS CUT.

THERE WAS EVEN A DISPUTE IN THE PRELIMINARY HEARING TRANSCRIPT AS TO WHETHER ALL OF THE DOORS WERE OPEN OR NOT, AND I HAVE NEVER SEEN A LISTING AS TO EXACTLY WHICH STORAGE UNITS THE DOORS WERE OPEN AND WHICH STORAGE UNITS THE LOCK WAS JUST CUT OFF.

THE COURT: DID YOU WANT TO RESPOND?

MR. BLAYLOCK: AGAIN, I SUGGEST WE'RE TALKING ABOUT THIS PREMATURELY. I THINK THIS IS ALL CIRCUMSTANTIAL EVIDENCE, AND THOSE ARE ALL THE FACTS THAT

OUR JURY SHOULD BE ABLE TO COVER IN MAKING A DETERMINATION OF WHETHER OR NOT THERE WERE BURGLARIES OF THESE INDIVIDUAL UNITS.

YOUR HONOR, OUR POSITION IS IT'S NOT PREJUDICIAL TO SAY THERE ARE 13 COUNTS. THE COURT IS GOING TO HAVE TO READ THE INFORMATION, AND THE INFORMATION TALKED ABOUT 13 COUNTS, 13 DIFFERENT VICTIMS AND 2 ADDITIONAL COUNTS. SO THE JURY IS GOING TO KNOW ABOUT THOSE, AND WHETHER OR NOT I ADDRESS THEM IN MY OPENING ARGUMENT OR NOT, I SUGGEST, ISN'T GOING TO BE PREJUDICIAL ONE WAY OR THE OTHER. IF I MAKE A MISSTATEMENT AS TO WHAT EVIDENCE WILL BE SHOWN, THEN I'M MORE LIKELY GOING TO HANG THE STATE'S CASE ON THOSE PARTICULAR ISSUES AND BE MORE PREJUDICIAL TO THE JURY WHEN THEY'RE INSTRUCTED THAT WHAT WE SAY ISN'T EVIDENCE ANYWAY AND THEY HAVE TO LISTEN TO WHAT THE EVIDENCE IS. AND SO FOR COUNSEL TO ARGUE ABOUT WHAT SHOULDN'T BE DISCUSSED I THINK IS PREMATURE.

THE COUNTS ARE THERE. BOTH DEFENDANTS WERE BOUND OVER ON 15 COUNTS. EVEN THE COURT WILL HAVE TO INSTRUCT THE JURY THAT'S WHAT THEY'RE CHARGED WITH. IF I CAN'T PROVE IT, I CAN'T PROVE IT. THAT'S A MATTER OF WHAT THE WITNESSES SAY, AND WHAT COULD BE INFERRED FROM THE EVIDENCE THAT'S FOUND AT THE SCENE.

THE COURT: WELL, I THINK I'M GOING TO GO AHEAD

AND PROCEED WITH THE 13 COUNTS. AND YOU MADE YOUR RECORD, MR. ANDERSON.

IS THERE ANYTHING-- NOW, THERE'S A MOTION IN LIMINE THAT I HAVEN'T SEEN.

MR. BLAYLOCK: I JUST RECEIVED THAT THIS MORNING.

THE COURT: WHO FILED THAT?

MR. YOUNGBERG: THIS IS MINE, JUDGE.

JUST AS I GOT TO COURT THIS MORNING, MR. BLAYLOCK HANDED ME A WITNESS STATEMENT TO THE EFFECT THAT THE KEYBOARD THAT WAS FOUND IN MR. SPRAGUE'S VEHICLE HAS BEEN IDENTIFIED BY THE SON-IN-LAW OF AN IDENTIFIED PERSON AS BEING IN ONE OF THE STORAGE UNITS.

IF CAN YOU, FILL ME IN ON WHAT UNIT.

MR. BLAYLOCK: NUMBER 64.

MR. ANDERSON: WHAT NUMBER?

MR. YOUNGBERG: ANYWAY THAT'S THE MOTION WE'RE TALKING ABOUT.

MR. BLAYLOCK: NUMBER 64. ELLEN DAVENPORT.

MR. YOUNGBERG: THAT'S FROM A BURGLARY THAT OCCURRED THE NIGHT BEFORE, NOT THE BURGLARY THAT'S CHARGED IN THIS CASE.

IT'S MY POSITION, JUDGE, THAT AT THE PRELIMINARY HEARING NO EVIDENCE WAS BROUGHT FORWARD ABOUT THE COMPUTER KEYBOARD BEING STOLEN. WHAT WAS PRESENTED

AT THE PRELIMINARY HEARING AS TO COUNT 15 IS THAT THE DEFENDANT WAS IN POSSESSION OF A STOLEN LOCK, OKAY, THAT HAD BEEN TAKEN THAT NIGHT.

WHAT THE PROSECUTOR IS PLANNING ON DOING, I ASSUME FROM THAT, IS TRY TO PROVE POSSESSION OF STOLEN PROPERTY USING THIS COMPUTER KEYBOARD THAT WAS TAKEN IN AN EARLIER-- PROBABLY AN EARLIER BURGLARY FROM THE SAME PLACE.

JUDGE, THERE ARE SEVERAL PROBLEMS WITH THAT, AS I SEE IT.

UNDER 77-88-1 IT TALKS ABOUT JOINDER OF OFFENSES AND DEFENDANTS. UNDER SUBSECTION FOUR THE COURT CAN MAKE A RULING THAT IF A DEFENDANT OR THE PROSECUTION IS PREJUDICED BY A JOINDER OF OFFENSES IN AN INDICTMENT OR INFORMATION THAT THE COURT SHALL ORDER AN ELECTION OF SEPARATE TRIALS, OF SEPARATE COUNTS.

OUR POSITION IS THAT AT THE PRELIM PROSECUTION WAS GOING FORWARD WITH POSSESSION OF A STOLEN LOCK, AND NOW WE COME TO TRIAL AND GO FORWARD FROM POSSESSION OF THE STOLEN PROPERTY FROM A PREVIOUS EPISODE, WHICH IS HIGHLY PREJUDICIAL TO MR. SPRAGUE AND MR. JENNINGS AS WELL, BECAUSE NOT ONLY ARE THEY BEING CHARGED WITH A BURGLARY THAT OCCURRED ON THE 29TH, BUT THEY'RE ALSO BEING ACCUSED OF BEING IN POSSESSION OF STOLEN PROPERTY FROM A BURGLARY THAT OCCURRED ON THE 28TH.

MR. ANDERSON: THE BURGLARY THEY'RE CHARGED WITH OCCURRED ON THE 30TH.

MR. YOUNGBERG: LATE NIGHT.

MR. ANDERSON: EARLY MORNING OF THE 30TH THERE WAS A BURGLARY-- EARLY MORNING ON THE 29TH WHERE A LOT OF PROPERTY WAS TAKEN OUT OF DIFFERENT STORAGE FACILITIES. THERE'S ONLY ONE FACILITY IN COMMON BETWEEN THE TWO BURGLARIES, AND THE PROPERTY THAT THEY'RE CLAIMING WAS FOUND IN THE SPRAGUE TRUCK RELATES TO THE BURGLARY ON THE 29TH, WHICH HE HAS NOT BEEN CHARGED WITH, WHICH HE IS NOT BOUND OVER ON AND HAS HAD NO PRELIMINARY HEARING ON.

I WOULD JOIN IN THE-- IN FACT, I WAS GOING TO ASK THE COURT NOT TO ALLOW ANY TESTIMONY OR ANY EVIDENCE OF THE PRIOR BURGLARY ON TWO OR THREE GROUNDS, THAT THE PREJUDICIAL EFFECT OUTWEIGHS ANY PROBATIVE VALUE, AND THERE'S NOT SUFFICIENT EVIDENCE LINKING THEM TO THAT, AND THAT THE STATEMENT, IN ITSELF, IS NOT SUFFICIENT, SIMPLY THAT THE PERSON IS SAYING THAT THE KEYBOARD WAS SIMILAR, THERE IS NO SERIAL NUMBER ON THE KEYBOARD AND THE STATE SHOULD NOT BE ALLOWED TO EVEN TALK ABOUT THE BURGLARY, OR ANY OF THEIR WITNESSES BE ALLOWED TO TALK ABOUT THE BURGLARY ON THE 29TH.

MR. YOUNGBERG: IT'S OUR POSITION THAT IF THEY WANT TO CHARGE WITH POSSESSING THE STOLEN KEYBOARD THEY SHOULD CHARGE THEM IN A SEPARATE CRIMINAL PROCEDURE

BECAUSE IT'S NOT STOLEN PROPERTY IN THIS BURGLARY, AND IT'S NOT ANYTHING THAT WAS TALKED ABOUT AT THE PRELIMINARY HEARING.

IN FACT THIS WITNESS STATEMENT WAS TAKEN ABOUT A WEEK AGO, MONTHS AND MONTHS AFTER THE PRELIMINARY HEARING WAS HELD. SO IT'S A SEPARATE CRIMINAL EPISODE, I SUPPOSE, AND THE PROSECUTION, IN MY OPINION, SHOULD FILE A CHARGE AGAINST THEM, IF THEY WANT TO, AS TO THAT COMPUTER KEYBOARD AND--

THE COURT: ARE YOU PROPOSING THAT WE SEVER THE CASE BY POSSESSION OF STOLEN PROPERTY?

MR. YOUNGBERG: IF THEY'RE GOING TO GO FORWARD-- IF THE STOLEN PROPERTY IS THE KEYBOARD, YES. THE ALTERNATIVE WOULD BE THAT THEY GO FORWARD ON THE LOCK AS PLANNED.

THE COURT: THE LOCK WHICH IS PART OF THIS CRIMINAL EPISODE?

MR. YOUNGBERG: RIGHT.

THE COURT: MR. BLAYLOCK?

MR. BLAYLOCK: THAT'S WHAT WE INTEND TO ALLEGE. WE DON'T INTEND TO ALLEGE THE STOLEN KEYBOARD. WHAT THIS IS OFFERED FOR IS JUST FOR PURPOSES OF IDENTIFICATION, TYING THEM TOGETHER WITH A COMMON SCHEME OR PLAN OF THE NIGHT BEFORE. YOU CAN'T GET ANY CLOSER IN TIME, THE NIGHT BEFORE. THESE LOCKS ARE CUT AND THERE

ARE ITEMS TAKEN. ONE OF THE ITEMS TAKEN IS THIS KEYBOARD.

COUNSEL, BOTH COUNSEL, HAD COPIES OF THE PICTURES OF THOSE ITEMS, AND THAT KEYBOARD IS SEEN IN THE BACK OF THE VEHICLE THAT BELONGS TO MR. SPRAGUE AND MR. JENNINGS. OKAY. THIS MERELY TIES THEM TOGETHER AND SHOWS, OKAY, HE'S IN POSSESSION OF PROPERTY THAT WAS TAKEN THE NIGHT BEFORE, AND I THINK THAT SHOWS THAT THERE WAS A COMMON SCHEME ON BOTH NIGHTS TO GO CUT THE LOCKS, TAKE THE PROPERTY.

AND IT GOES TO THE QUESTION THAT WAS RAISED EARLIER, WELL, BUT YOU CAN'T SHOW THAT THEY GOT INTO ANY OF THOSE LOCKERS. WELL, WE CAN. WHY? BECAUSE THEIR PROPERTY WAS TAKEN FROM ONE OF THE LOCKERS THAT WAS TAKEN THE NIGHT BEFORE, THAT WAS IN HIS VEHICLE.

MR. YOUNGBERG: YOUR WITNESS TESTIFIED THAT IS THE SAME KEYBOARD. WHAT'S THAT IDENTIFICATION BASED ON?

MR. BLAYLOCK: ON THE FACT THAT HE PURCHASED IT FOR HIS FATHER-IN-LAW AND PUT IT IN THAT LOCKER AND NOW IT'S GONE. IT WAS TAKEN ON THE NIGHT OF THE 29TH--MORNING OF THE 29TH.

MR. ANDERSON: BUT, YOUR HONOR, THERE ARE NO SERIAL NUMBERS. IT'S SIMPLY THAT HE'S SAYING IT'S THE SAME BRAND. THERE ARE LOTS OF KEYBOARDS OUT ON THE MARKET AND A LOT OF COMPUTERS.

MY PROBLEM, YOUR HONOR, IS THAT IT'S FORCING ME TO DEFEND TWO CASES AT ONCE. I HAVE TO NOW DEFEND THE 29TH CASE AS TO MR. JENNINGS WHO IS SIMPLY A PASSENGER IN MR. SPRAGUE'S VEHICLE WHERE THE KEYBOARD IS FOUND. THERE'S NOT ANY EVIDENCE OR TESTIMONY THAT MR. JENNINGS WAS WITH MR. SPRAGUE THE NIGHT BEFORE.

THAT IS FORCING ME TO TRY TWO CASES. IT'S BY A COMMON SCHEME OR PLAN USUALLY THAT'S INVOLVED WHERE THERE'S A PRIOR CONVICTION AND THEY'RE TRYING TO SHOW A PATTERN OF CRIMINAL CONDUCT. IF MR. BLAYLOCK HAS SUFFICIENT EVIDENCE OTHER THAN THE KEYBOARD TO LINK THESE PEOPLE TO THAT, THEN WE NEED TO HAVE A HEARING TO DETERMINE WHETHER OR NOT IT WOULD RISE NOW TO A LEVEL TO BE RELIED ON BEFORE THE JURY SHOULD HEAR IT.

MR. BLAYLOCK: TWO THINGS. IT DOESN'T GO TO THE ADMISSIBILITY. THEY DON'T HAVE THE SERIAL NUMBER. IT MAY GO TO THE WEIGHT THAT THE JURY SHOULD GIVE THIS AND THAT'S--

THE COURT: I DON'T THINK THE SERIAL NUMBER IS WHAT BOTHERS ME ABOUT THAT.

MR. BLAYLOCK: THE SECOND QUESTION IS, OKAY, IF COUNSEL SAYS, LOOK, WE'RE SURPRISED BY THIS, I HAVE NO OBJECTION TO GIVING THEM TIME TO LOOK AT IT, TALK TO THE WITNESSES BEFORE THOSE WITNESSES ARE CALLED. AND IF IT COMES DOWN TO A CONTINUANCE, THAT'S FINE. IF THEY FEEL

THAT IT'S IMPORTANT TO THEM THAT THEY CONTINUE IT, THAT THEY HAVE A HEARING AS STATED BY MR. ANDERSON, THAT'S FINE. I HAVE NO OBJECTION TO THAT.

WE'RE GEARED UP TO GO TO TRIAL TODAY, BUT IF THEY FEEL IT'S UNFAIR BECAUSE OF THE SURPRISE ELEMENT, I SUGGEST TO THE COURT THAT THEY WERE AWARE OF THIS. THEY WEREN'T AWARE OF THIS PARTICULAR STATEMENT FROM THIS PARTICULAR INDIVIDUAL BECAUSE I RECEIVED THIS JUST RECENTLY, AND I SHOULD HAVE GOTTEN IT TO THEM EARLIER. IT'S JUST ONE OF THOSE THINGS THAT HAPPENS, AND I APOLOGIZE TO THE COURT AND COUNSEL.

WE'RE AWARE OF THE KEYBOARD. I MADE STATEMENTS TO THEM THAT IT HAD BEEN IDENTIFIED AS COMING FROM ONE OF THE LOCKERS AND DIDN'T CLARIFY IT WAS ONE OF THE LOCKERS FROM BEFORE. AND IT WAS RECENTLY THAT I WAS ABLE TO PIN DOWN EXACTLY WHICH ONE IT WAS WHEN I TALKED TO THE MANAGERS.

THE COURT: THAT'S SOMETHING THAT THEY OBVIOUSLY COULD HAVE DONE BY TALKING TO THE MANAGER OF THE FACILITY, BUT THAT WAS-- THAT DIDN'T HAPPEN. SO I SEE A COUPLE OF SOLUTIONS AND THOSE ARE THE SOLUTIONS.

MR. YOUNGBERG: WHAT ABOUT SEVERING? HOW ARE YOU PREJUDICED BY SEVERING IT?

MR. BLAYLOCK: THE COUNT THAT'S CHARGED-- SEVERING WHAT?

MR. YOUNGBERG: COUNT 15.

MR. BLAYLOCK: COUNT 15. I WAS NOT GOING TO USE COUNT 15 ANYWAY.

MR. ANDERSON: YOU WANT TO USE THE KEYBOARD TO ESTABLISH THE PATTERN OR THE SCHEME, TO CONVICT THEM OF ALL 13 BURGLARIES.

MR. BLAYLOCK: COMMON SCHEME OR PLAN. THIS INDIVIDUAL THAT BURGLARIZED IT THE DAY BEFORE IS THE SAME INDIVIDUAL THAT BURGLARIZED IT THIS TIME. WHY? BECAUSE WE FOUND IT AND HE HAS THE PROPERTY.

MR. YOUNGBERG: I WOULD RENEW MY OBJECTION, FORGET THE MOTION TO SEVER, AND TURN TO THE ALTERNATIVE MOTION IN LIMINE TO EXCLUDE REFERENCE TO THE KEYBOARD IN THIS CASE. THAT IS EVIDENCE OF A PRIOR BAD ACT, CLEARLY HIGHLY PREJUDICIAL, I BELIEVE, UNDER RULES 403 AND 404.

THERE IS ALSO-- THERE'S A QUESTION OF A VIOLATION IN THIS SITUATION. MR. BLAYLOCK APPARENTLY FAXED THAT WITNESS STATEMENT OVER TO ME THIS MORNING. I DIDN'T GET IT BECAUSE I WAS IN COURT HERE, BUT IT WAS HANDED TO ME THIS MORNING.

NOW HE HAS A CONTINUING DUTY TO PROVIDE US WITH THIS SORT OF INFORMATION, AND WHEN HE SAYS THAT HE IDENTIFIED THAT COMPUTER BOARD AS COMING OUT OF ONE OF THE UNITS, WE'RE DEALING WITH TWO BURGLARY NIGHTS AND 13 UNITS ONE NIGHT, AND 7 OR 8 UNITS THE NIGHT BEFORE.

THAT'S TWO. I CAN SHOW YOU THE PRELIMINARY HEARING TRANSCRIPT WHERE WE ASKED THE OFFICER DIRECTLY IF THERE WAS ANY EVIDENCE THAT THE KEYBOARD WAS STOLEN PROPERTY AND HE SAID NO.

THE COURT: NOW THEY FOUND OUT THAT IT IS.

MR. BLAYLOCK: THE OFFICER HE WAS ASKING WAS THE OFFICER THAT RESPONDED THE FIRST TIME. IT WASN'T THE DETECTIVE IN CHARGE OF THE CASE FOLLOWING UP DIFFERENT LEADS. SO THE OFFICER THAT HE ASKED WOULDN'T HAVE BEEN THE ONE.

WHEN I SAID THAT I MENTIONED IT, IT WASN'T IN THE PRELIMINARY HEARING. IT WAS AS WE WERE DISCUSSING, SAYING, OKAY, WHAT ARE THE THINGS THAT TIE THESE INDIVIDUALS TO THE PARTICULAR EVENTS? THE COMPUTER WAS ONE OF THE THINGS THAT I MENTIONED THAT TIED THEM TO THESE EVENTS BECAUSE IT HAD BEEN TAKEN FROM ONE OF THE LOCKERS.

THE COURT: MR. BLAYLOCK IS TELLING ME, IF I UNDERSTAND IT CORRECTLY, HE WOULD BE WILLING TO CONTINUE THE TRIAL ON YOUR-- ONE OF YOUR POINTS, THAT IT'S A DISCOVERY VIOLATION AND YOU'RE ENTITLED TO NOTICE, AND HE DIDN'T GET IT TO YOU SOON ENOUGH.

THE QUESTION IN MY MIND IS, IS THAT-- IS THIS ASPECT OF THE CASE SO CRITICAL TO THIS PARTICULAR CASE THAT YOU WOULD RATHER CONTINUE IT THAN JUST GO AHEAD AND

TRY IT WITHOUT REFERENCE TO THE KEYBOARD? BECAUSE I THINK YOU'VE GOT THAT CHOICE.

MR. ANDERSON: I PREFER TO GO AHEAD AND TRY THE CASE WITHOUT REFERENCE TO THE KEYBOARD. I THINK THE TALK OF THE BURGLARY ON THE 29TH, THAT THERE IS NO CONVICTION-- THERE HAVE BEEN NO CHARGES, ESPECIALLY REGARDING MR. JENNINGS, AS MR. BLAYLOCK EVEN SAID, HE'S THE INDIVIDUAL-- IT'S MR. SPRAGUE'S CAR. THERE'S NO EVIDENCE THAT MR. JENNINGS WAS WITH MR. SPRAGUE THE NIGHT BEFORE. AND SO THE PREJUDICIAL EFFECT TO MR. JENNINGS IS-- YOU KNOW, HE'S JUST IN THE CAR; THE COMPUTER BOARD IS THERE. THERE'S NOT AN ALLEGATION IT WAS TAKEN THE NIGHT THAT HE WAS IN THE CAR.

THE COURT: IS THERE ANY WAY YOU CAN LINK UP MR. JENNINGS TO THE COMPUTER BOARD BURGLARY THE NIGHT BEFORE OTHER THAN THE FACT THAT HE WAS IN THE CAR WHERE IT WAS FOUND?

MR. BLAYLOCK: THAT'S BASICALLY IT. SO THE PROBLEM WE RUN INTO IS THAT THESE ARE CODEFENDANTS AND THEY NEED TO BE TRIED TOGETHER.

THE COURT: RIGHT.

MR. BLAYLOCK: AND SO IF COUNSEL IS RIGHT AND IF HE'S ABLE TO SAY THAT THERE IS NO CONNECTION WITH HIS CLIENT, THEN HIS CLIENT WILL BE RELEASED, WILL BE FOUND NOT GUILTY.

MR. ANDERSON: BUT, YOUR HONOR, THAT'S SHIFTING THE BURDEN TO ME. I HAVE TO PROVE THAT HE WASN'T PRESENT. I MEAN BY MAKING THE INFERENCES I THINK IS PREJUDICIAL, AND THE OFFICERS TESTIFIED THEY DON'T-- THERE WERE NO WITNESSES TO THE BURGLARY ON THE 29TH. NOW WE-- THE ONLY EVIDENCE THAT THEY SAY LINKS IT IS THIS KEYBOARD, BUT, YOU KNOW, THERE HAVE BEEN NO CHARGES REGARDING THE 29TH. TO SAY IT'S A PATTERN OF CRIMINAL CONDUCT USUALLY APPLIES WHEN THERE HAVE BEEN PRIOR CONVICTIONS. THERE HAVE BEEN NO PRIOR CONVICTIONS. THERE HAVEN'T BEEN PRIOR CHARGES. THIS IS THE FIRST TIME WE HEARD THAT THE COMPUTER BOARD CAME FROM THIS FACILITY.

MR. BLAYLOCK: IT'S NOT NECESSARY THAT THERE BE PRIOR CONVICTIONS. THAT'S ABSOLUTELY NOT NECESSARY. THIS IS EVIDENCE THAT'S PROBATIVE. I SUGGEST TO THE COURT IT'S VERY PROBATIVE BECAUSE IT TIES PERSONAL PROPERTY THAT WAS BEING LOCKED IN THE STORAGE FACILITY TO THESE TWO INDIVIDUALS BECAUSE THEY ARE IN POSSESSION OF IT. IT'S IN THE VEHICLE IN WHICH THEY'RE RIDING WHICH IS BEING DRIVEN BY THEM. IT'S VERY PROBATIVE.

IS IT UNDULY PREJUDICIAL? I WOULD SUGGEST TO THE COURT, NO, IT IS NOT. ALL OF THE INFORMATION THAT WE PRESENTED ON BEHALF OF THE STATE PREJUDICES THE DEFENDANT, OTHERWISE WE WOULDN'T PRESENT IT. THAT'S THE WHOLE PURPOSE, IS TO PRESENT EVIDENCE THAT TIES

INDIVIDUALS TO CRIMINAL ACTIVITY, AND THAT IS PREJUDICIAL.

THE QUESTION IS, IS IT UNDULY PREJUDICIAL, AND I SUGGEST THAT IT ISN'T.

THE COURT: WE'VE GOT A DISCOVERY VIOLATION, I THINK, BY YOU NOT HAVING BROUGHT THAT FORWARD UNTIL NOW. I DON'T THINK IT'S INTENTIONAL, BUT I THINK, NEVERTHELESS, IT'S A PROBLEM.

AND I ALSO THINK THAT THE TENUOUSNESS OF THE RELATIONSHIP OF THE COMPUTER BOARD TO AT LEAST MR. JENNINGS' SITUATION IS SUCH THAT IT'S-- UNDER RULE 403, THE PREJUDICE WOULD OUTWEIGH THE PROBATIVE VALUE. SO I WON'T LET IT IN THIS TRIAL TODAY AS PART OF THE CASE.

NOW, I THINK WE HAVE BEEN PUTTING THIS CASE OFF FOR A LONG TIME, SO I THINK WHAT WE BETTER DO IS GO AHEAD AND TRY IT, WITH WHAT WE HAVE GOT.

IS THERE ANYTHING ELSE?

MR. BLAYLOCK: WELL, YOUR HONOR, THAT PUTS US IN A POSITION WHERE WE HAVE NO RECOURSE. WHAT DO WE DO? YOU KNOW.

THE COURT: WELL, ARE YOU TELLING ME THAT THE KEYBOARD WAS YOUR CASE?

MR. BLAYLOCK: NO. I'M JUST SAYING THAT THIS IS A RULING FOR WHICH I HAVE NO REMEDY, NO RECOURSE.

Addendum C

ROBIN K. YOUNGBERG (6056)
Salt Lake Legal Defender Association
Attorney for Defendant
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION FOR ARREST OF JUDGMENT
Plaintiff,	:	
-v-	:	
JEFFERY SPRAGUE,	:	Case No. 951900792FS JUDGE WILLIAM B. BOHLING
Defendant.	:	

Pursuant to Rule 23 of the Utah Rules of Criminal Procedure, Jeffery Sprague, through counsel Robin Youngberg, respectfully moves this court to arrest judgment on Counts I, III, VII, and X of the Information. Grounds for this motion are that there was no evidence presented that there was an entry of the storage units named in those counts.

On November 16, 1995, Jeffery Sprague was found guilty by a jury of thirteen counts of burglary of a non-dwelling. The elements of burglary require evidence that a defendant entered or unlawfully remained in a building with the intent to commit a theft. Utah Code Ann. S 76-6-201(4) defines "enter" as: (a)intrusion of any part of the body; or (b)intrusion of any physical object under the control of the actor.

The testimony adduced at trial as to Counts I, III, VII, and X indicated that although the locks on those units had

been cut, and the doors were open to various extents, nothing was disturbed within the units. Thus, there was no evidence showing that anyone had entered the units.

Defense counsel was unable to locate any Utah cases dealing with the question of whether a broken outside lock constitutes proof of entry. However, the history of Utah's burglary statute is instructive in this regard. Prior to Statehood, Utah had one crime of burglary, which was as follows:

> Every person who, in the night time, forcibly breaks and enters, or without force enters through any open door, window or other aperture, any house, room, apartment or tenement, . . . with intent to commit larceny or any felony, is guilty of burglary.

[Sec. 4621, C.L.U. 1888].

In 1905, the legislature divided burglary into two degrees. The statute still required a "breaking and entering". In 1907, the legislature further divided burglary into three degrees, depending on whether explosives were used to gain entry. The "breaking and entering" language remained. It is clear that Utah has historically required both a "breaking" and an "entering" in order to convict a person of burglary. In the present case, the prosecution has only presented evidence of a "breaking", but has not shown an entry on the four counts in issue.

It appears that the lack of case law on this particular issue stems from the fact that prosecutors rarely charge burglary if there is no evidence of actual entry. It is only the particular facts of this case that give rise to this issue.

Oklahoma appellate courts have considered the related

issue of whether breaking an opening into a building can meet the elements of attempted burglary. In Robinson v. State, 557 P.2d 1155 (Okl.Cr. 1977), the defendant was accused of removing a window fan in order to gain entry into a cafe. There was nothing disturbed in the cafe, and the defendant was charged and convicted of attempted burglary. The court noted that the "State in no way tried to prove actual entry into the cafe", and that there "was no conclusive evidence that the defendant did enter the cafe." Id. at 1157.

In the present case, the prosecutor argued, and the jury apparently accepted, that the demonstrated entry into other storage units supports an inference that all the storage units were entered. However, this is a fallacious argument. Rule 404(b) of the Utah Rules of Evidence provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Therefore, proof that other units were entered and robbed would be admissible for certain purposes, such as to show intent or to negate a claim of mistake, but it clearly cannot be used to prove physical entry by defendant.

Obviously, each count in an Information needs to be considered individually, and the State has the burden to present evidence pertaining to each charge alleged. There is an inherent danger in trials in which numerous counts are alleged that a finding of guilt on some counts may affect deliberations

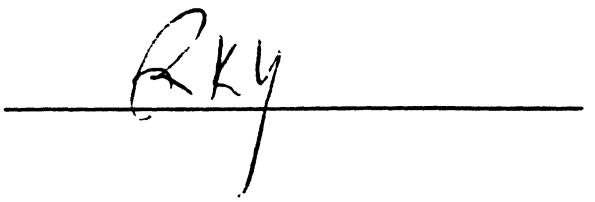
on other counts. That is precisely what happened in this case.

For the reasons stated above, Mr. Sprague moves this court to arrest judgment on Counts I, III, VII, and X.

DATED this 17 day of December, 1995.

ROBIN K. YOUNGBERG
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to the Salt Lake District Attorney's Office, 231 East Fourth South, Salt Lake City, Utah 84111 this 8 day of December, 1995.



ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900791

JACK CHRISTOPHER JENNINGS,

DEFENDANT,

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900792

JEFFREY SPRAGUE,

DEFENDANT.

BEFORE THE HONORABLE WILLIAM B. BOHLING, JUDGE

NOVEMBER 15, 1995
AFTERNOON SESSION

REPORTER'S TRANSCRIPT OF ON APPEAL

960154-CA 000021

SHORT RECESS, LADIES AND GENTLEMEN OF THE JURY, AND I ASK THAT WHILE WE'RE IN RECESS THAT YOU NOT DISCUSS THE CASE WITH EACH OTHER, NOT FORM ANY OPINIONS, NOT ALLOW ANYONE TO COMMUNICATE WITH YOU ABOUT THE CASE OR COMMUNICATE WITH ANYONE ABOUT THE CASE AND DO NOT BEGIN DELIBERATIONS.

WE'LL BE BACK ON THE RECORD IN ABOUT TEN MINUTES.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUTSIDE THE PRESENCE OF THE JURY.)

THE COURT: THE RECORD SHOULD SHOW THE JURY HAS LEFT THE COURTROOM.

MR. YOUNGBERG?

MR. ANDERSON: YOUR HONOR, ACTUALLY IF I COULD PROCEED FIRST-- I HAVE MADE SOME NOTATIONS OF DIFFERENT COUNTS.

THE COURT: ALL RIGHT.

MR. ANDERSON: I THINK MR. YOUNGBERG WOULD JOIN IN THIS MOTION.

AS PURELY A LEGAL ISSUE, WE WOULD MOVE TO DISMISS COUNT ONE, COUNT THREE, COUNT SEVEN, COUNT EIGHT, COUNT TEN, AND COUNT ELEVEN OF THE INFORMATION.

YOUR HONOR, THE BASIS FOR THAT IS TWO OF THE COUNTS, COUNT THREE AND COUNT EIGHT, THE VICTIMS, ALLEGED

VICTIMS, DID NOT PROVIDE ANY TESTIMONY SO THERE'S ABSOLUTELY NOTHING IN THE RECORD REGARDING ANY ENTRY OR EVIDENCE OF ENTRY INTO THE STORAGE FACILITIES.

AS TO COUNTS ONE, SEVEN, TEN, AND ELEVEN, YOUR HONOR, THE TESTIMONY OF ALL OF THOSE ALLEGED VICTIMS WAS THAT WHEN THEY LOOKED AT THE STORAGE FACILITY THEY DIDN'T THINK ANYTHING HAD BEEN MOVED AND NOTHING WAS MISSING. SO THERE IS NO EVIDENCE OF AN ACTUAL ENTRY.

IT IS OUR POSITION THAT THE STATUTE REQUIRES AN INTRUSION OF THE BODY OR SOME PART OF THE BODY.

NOW, I KNOW CASES HELD THAT SHOOTING A BULLET INTO A HOUSE OR PUTTING A SCREW DRIVER THROUGH A WINDOW IS AN ENTRY BECAUSE THE PLAIN, THE INTERIOR TO THE BUILDING, HAS BEEN BROKEN. IN THIS CASE THE LOCK WAS CUT-- WHICH IS EXTERIOR -- HANDLE COULD HAVE BEEN HELD AND THE DOOR SLID OPEN AND NO ENTRY MADE, WITHOUT ANY EVIDENCE OF AN ENTRY INTO THOSE FACILITIES.

WE WOULD ASK THE COURT TO DISMISS-- THAT THERE ISN'T ANYTHING IN EVIDENCE AS TO THOSE COUNTS.

I ALSO POINT OUT TO THE COURT THAT I AM NOT JUST CHOOSING THOSE AREAS WHERE NOTHING WAS TAKEN. IF THE WITNESS TESTIFIED SOMETHING HAD BEEN MOVED AROUND OR DISTURBED INSIDE, I'M NOT MOVING TO DISMISS THOSE BECAUSE I THINK THAT WOULD BE EVIDENCE OF AN ENTRY, AND THAT'S A QUESTION OF FACT FOR THE JURY.

I THINK THE OTHERS INVOLVED LEGAL ISSUES AND THERE WAS NO EVIDENCE AT ALL IN THE RECORD OF ENTRY, OTHER THAN THE STATE'S POSITION, I THINK THAT MAYBE-- WELL, THE CIRCUMSTANCE ON 11 IS THAT THEY COULD HAVE COME IN, BUT THERE IS NO EVIDENCE THAT THERE WAS AN ENTRY. AND I WOULD ASK THE COURT TO DISMISS THOSE.

MR. YOUNGBERG: THAT'S OUR MOTION AS WELL.

THE COURT: MR. BLAYLOCK?

THE COURT: JUST FOR CLARIFICATION, YOU'RE TALKING ABOUT ONE, SEVEN, TEN, AND ELEVEN, AND THAT THERE WAS NOTHING MOVED OR MISSING FROM THOSE UNITS?

MR. ANDERSON: THAT'S CORRECT.

MR. BLAYLOCK: AND THREE AND EIGHT, NO VICTIMS TESTIFIED?

MR. ANDERSON: CORRECT.

MR. BLAYLOCK: YOUR HONOR, FIRST OF ALL WITH REGARDS TO THREE AND EIGHT, I SUBMIT THAT THE EVIDENCE IS THAT THE LOCKS WERE CUT, THE DOORS WERE OPENED. AND THAT TESTIMONY WAS GIVEN BY WESLEY TAYLOR. AND I WOULD SUGGEST THAT THE EVIDENCE THAT THERE MIGHT HAVE BEEN AN ENTRY IS THE EVIDENCE THAT THERE WAS AN ENTRY IN THE OTHER UNITS. AND THE FACT THAT SOMETHING MAY NOT HAVE BEEN MISSING, THAT BASICALLY IS FOR THE JURY TO DECIDE, AND I WOULD SUGGEST THAT SINCE THERE IS EVIDENCE OF ENTRY TO THE OTHER UNITS, THAT WOULD BE CONSISTENT, THAT WOULD

ALSO BE CONSISTENT TO THE ENTRY OF THOSE UNITS.

AGAIN, I SUGGEST IT'S A FACTUAL QUESTION FOR THE JURY TO DECIDE. THAT IS SOMETHING THAT COULD BE ARGUED, AND I WOULD SUGGEST THAT IT OUGHT TO AT LEAST GO TO THE JURY ON THAT ISSUE FOR THEIR DETERMINATION, BECAUSE THERE WAS CLEARLY EVIDENCE ON THE OTHER UNITS THAT THERE WAS SOME TYPE OF ENTRY, THAT THINGS HAD BEEN MOVED, AND THINGS WERE MISSING. THAT WAS VERY CLEARLY STATED.

THE COURT: ANY FURTHER ARGUMENT?

MR. ANDERSON: WELL, THERE WASN'T EVIDENCE ON ALL OF THE UNITS.

I THINK, YOUR HONOR, I THINK WITH JUST THAT INFERENCE THE BURDEN IS ON THE STATE TO ESTABLISH THE ELEMENTS OF A CRIME, AND ONE OF THE ELEMENTS OF THE CRIME IS ENTRY, MEANING AN INTRUSION INTO THE BUILDING. AND ON THESE COUNTS THAT I POINT OUT THERE WAS NO EVIDENCE IN THE RECORD, ABSOLUTELY NO EVIDENCE, THAT THERE WAS AN INTRUSION INTO THE BUILDING.

THE COURT: WELL, I CONSIDER THE EVIDENCE TO BE EXTREMELY THIN. HOWEVER, THERE IS, IT SEEMS TO THE COURT, CIRCUMSTANTIAL EVIDENCE, IN FACT, WITH RESPECT TO SEVERAL LOCKERS WHEN THERE HAS BEEN A BOLT CUT AND A DOOR LIFTED, THAT THAT HAS RESULTED IN AN ENTRY. IN SOME CASES THERE HAS BEEN SOME LOSS REPORTED, AND IN OTHERS

NOTHING MORE THAN THE FACT THAT THERE WAS A DISTURBANCE. AND I BELIEVE ON THAT BASIS, THAT FROM THIS, THE JURY COULD INFER THAT THERE HAD BEEN ENTRY INTO THE OTHERS. AND I THINK THAT THE-- THEREFORE THE STATE HAS MET AT LEAST THE BURDEN OF SUBMITTING IT TO THE JURY, AND SO THE COURT IS WILLING TO ACKNOWLEDGE THAT THE EVIDENCE IS VERY THIN, AND MAY RECONSIDER THE ISSUE ON POST TRIAL MOTIONS; BUT AT THIS POINT I'M SATISFIED THE STATE MET ITS BURDEN AND WILL SUBMIT IT TO THE JURY, AND I'M GOING TO DENY THE MOTION.

ANYTHING ELSE?

MR. YOUNGBERG: I DON'T BELIEVE SO, JUDGE.

AT SOME POINT WE STILL HAVE TO PUT ON THE RECORD THE OBJECTION TO THE 29TH TESTIMONY, BUT IF YOU WANT TO PUSH AHEAD, I SUPPOSE WE CAN START CALLING OUR WITNESSES.

THE COURT: I THINK WHAT I WANT TO DO IS I WANT TO GET THIS CASE SUBMITTED TO THE JURY AS SOON AS WE CAN DO IT. AND AS SOON AS THAT'S DONE I WOULD INVITE COUNSEL TO PUT EVERYTHING ON THE RECORD.

MR. YOUNGBERG: ALL RIGHT.

MR. BLAYLOCK: JUDGE, SO THAT THERE ISN'T ANY QUESTION ABOUT THAT ON BEHALF OF THE STATE, WE WOULD STIPULATE THAT WOULD HAVE BEEN TAKEN EARLIER IN THE TRIAL AND IT'S ONLY BECAUSE OF THE PRESS OF GETTING THIS THING

SALT LAKE CITY, UTAH; MONDAY, FEBRUARY 12, 1996; P.M.

P R O C E E D I N G S

THE COURT: WE'LL GO ON RECORD IN THE STATE OF UTAH VERSUS JEFFERY SPRAGUE, 9951900792.

THE RECORD SHOULD SHOW MR. SPRAGUE IS BEFORE THE COURT AND MR. YOUNGBERG HIS COUNSEL REPRESENTING HIM.

THERE WAS A PRESENTENCE REPORT PREPARED. MR. YOUNGBERG, HAVE YOU HAD A CHANCE TO REVIEW THAT WITH YOUR CLIENT.

MR. YOUNGBERG: WE HAVE, JUDGE.

THE COURT: ARE YOU PREPARED TO GO FORWARD WITH SENTENCING AT THIS TIME.

MR. YOUNGBERG: WE ARE.

THE COURT: PLEASE PROCEED.

MR. YOUNGBERG: I GUESS THE FIRST THING I SHOULD BRING UP, JUDGE, IS THAT AFTER THE TRIAL I FILED A MOTION, A JUDGMENT NOTWITHSTANDING THE VERDICT ON FOUR COUNTS OUT OF THE THIRTEEN THIRD-DEGREE FELONIES. IF THE COURT RECALLS, IT WAS OUR POSITION THAT AS TO COUNTS ONE, THREE, SEVEN AND TEN, THERE HAD BEEN NO EVIDENCE PRESENTED THAT THOSE PARTICULAR STORAGE UNITS HAD EVER BEEN ENTERED. THERE WAS EVIDENCE PRESENTED THAT THE LOCKS HAD BEEN CUT OFF, BUT THERE WAS NOTHING MOVED INSIDE THOSE FOUR UNITS, NOR WAS ANYTHING TAKEN FROM

THOSE FOUR UNITS.

THE COURT: I REMEMBER YOU RAISED THAT REPEATEDLY DURING THE TRIAL, SO THE COURT DID ADDRESS THAT.

MR. YOUNGBERG: OKAY. AND I BELIEVE THAT HAS NEVER BEEN RULED ON, BUT THE JUDGMENT NOTWITHSTANDING-- I KNOW THE STATE HAS FILED A MEMORANDUM IN OPPOSITION, AND I HAVE BEEN GIVEN A COPY OF THAT SOME TIME AGO, BUT I DON'T KNOW, FOR THE RECORD, IF THE COURT HAS EVER RULED ON THAT MOTION.

THE COURT: IF NOT, THE COURT WILL DENY THE MOTION, BASED ON THE REASONS THE COURT STATED ON THE RECORD AT THE CRIMINAL TRIAL. IT FELT THAT WAS PROPERLY PRESENTED TO THE JURY AND THE JURY DECIDED ON THE EVIDENCE THAT WAS THERE.

MR. YOUNGBERG: SO WE'RE PREPARED TO GO FORWARD, JUDGE, ON SENTENCING.

THE FIRST QUESTION WE WANT TO CLEAR UP IS THE REASON WE ASKED FOR THE CONTINUANCE OF TWO OR THREE WEEKS, IS THAT IN THE PRESENTENCE REPORT THEY INDICATED THAT MR. SPRAGUE HAD BEEN EXTRADITED BACK TO KANSAS. I WAS ABLE TO TRACK THAT SITUATION DOWN AND I CAN REPRESENT TO THE COURT THAT MR. SPRAGUE WAS NOT EVER EXTRADITED BACK TO KANSAS. THERE WAS A WARRANT ISSUED BASED ON THE FINE THAT WAS NOT PAID IN KANSAS, SO HE WAS PICKED UP ON

Addendum D

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900791

JACK CHRISTOPHER JENNINGS,

DEFENDANT,

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900792

JEFFREY SPRAGUE,

DEFENDANT.

BEFORE THE HONORABLE WILLIAM B. BOHLING, JUDGE

NOVEMBER 14, 1995

REPORTER'S TRANSCRIPT ON APPEAL

960154-CA

Q. WERE YOU NOTIFIED SOMETIME EARLIER THIS YEAR IN MARCH ABOUT A PROBLEM THAT HAD OCCURRED AT CENTRAL SELF-STORAGE?

A. YES, I WAS.

Q. WERE YOU NOTIFIED AS TO A PROBLEM THAT OCCURRED ON THE 29TH OF MARCH?

A. THAT WAS THE FIRST TIME-- NOT POSITIVE ABOUT THE DATE, BUT IT WAS WHEN IT WAS BROKEN INTO THE FIRST TIME.

Q. THE FIRST TIME?

A. UM-HUM.

Q. HOW WERE YOU NOTIFIED?

A. POLICE OFFICER CALLED OUR HOME, AND IT WAS ABOUT TWO IN THE MORNING, TWO OR THREE IN THE MORNING, AND SAID THAT OUR STORAGE UNIT HAD BEEN BROKEN INTO.

AND SO MY HUSBAND AND MY SON AND I WENT DOWN TO THE STORAGE UNIT AT THAT TIME, AND THE POLICE OFFICER TOOK US OVER THERE, AND IT HAD BEEN BROKEN INTO.

MR. BLAYLOCK: MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

(EXHIBIT 8-S INTRODUCED FOR IDENTIFICATION.)

Q. (BY MR. BLAYLOCK) LET ME SHOW YOU WHAT HAS BEEN MARKED AS STATE'S PROPOSED EXHIBIT S-8. CAN YOU IDENTIFY THAT?

A. YES.

Q. WHAT IS THAT?

A. THIS IS A PICTURE OF MY STORAGE UNIT. THIS WAS THE FIRST NIGHT THAT IT WAS BROKEN INTO.

Q. DOES THAT FAIRLY REPRESENT TO YOU THE WAY IT APPEARED TO YOU AS YOU WERE THERE THAT MORNING?

A. UM-HUM. THERE WERE BOXES THROWN AROUND. THINGS STILL SEEMED TO BE IN SOMEWHAT THE SAME PLACES THAT THEY WERE WHEN I PUT THEM IN.

Q. NOW, HAD YOU PLACED A LOCK ON THAT LOCKER YOURSELF?

A. YES.

Q. WHAT HAPPENED TO THAT LOCK?

A. IT WAS CUT OFF.

Q. AFTER THE 29TH OF MARCH DID YOU THEN PLACE-- WAS THERE ANOTHER LOCK PLACED ON YOUR LOCKER?

A. THERE WAS ANOTHER LOCK PLACED ON THERE THAT NIGHT. MY HUSBAND AND I PLACED THE LOCK ON.

Q. AND AGAIN WAS THIS ONE OF YOUR LOCKS?

A. YES, IT WAS.

Q. DID YOU-- WERE YOU NOTIFIED AGAIN ABOUT A PROBLEM OCCURRING AT CENTRAL SELF-STORAGE?

A. I WAS. THE NEXT MORNING AT TWO OR THREE O'CLOCK IN THE MORNING MY UNIT HAD BEEN BROKEN INTO AGAIN, AND THIS TIME-- CAN I TALK? I WAS VERY, VERY

ANGRY. THE FIRST NIGHT I WAS UPSET. THE SECOND NIGHT I WAS ANGRY.

MR. BLAYLOCK: MAY I APPROACH AGAIN, YOUR HONOR?

THE COURT: YOU MAY.

Q. (BY MR. BLAYLOCK) WOULD YOU LOOK AT WHAT HAS BEEN MARKED 9-S, PROPOSED STATE'S EXHIBIT. CAN YOU IDENTIFY THAT?

A. UM-HUM. IT'S MY STORAGE UNIT.

Q. AND ON WHAT NIGHT WOULD THAT BE, OR MORNING?

A. THE NEXT MORNING. IT WAS THE SECOND DAY. SECOND MORNING IT WAS BROKEN INTO.

Q. THAT WOULD BE THE 30TH OF MARCH?

A. IF THAT WAS THE DATE.

Q. AND WHAT DID YOU FIND MISSING ON THE 30TH OF MARCH?

A. I FOUND ALL OF MY SON AND DAUGHTER-IN-LAW'S BABY FURNITURE HAD BEEN STOLEN. THERE WAS THEIR CRADLE, NEW PLAYPEN, A HIGH CHAIR, A CAR SEAT. AND THEN THEY TOOK MY CRADLE. THAT WAS A BIG-- A BIG WOODEN CRADLE THAT HAD BEEN HANDMADE, AND THEY TOOK THAT. THEY HAD TO GET INTO THE BACK OF MY STORAGE, AND THEY TOOK THAT OUT.

AND I'M SORRY, BUT THAT UPSETS ME BECAUSE THAT WAS MINE AND THAT WAS FROM--

MR. YOUNGBERG: I ASK THAT THE WITNESS PROCEED

Addendum E

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900791

JACK CHRISTOPHER JENNINGS,

DEFENDANT,

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900792

JEFFREY SPRAGUE,

DEFENDANT.

BEFORE THE HONORABLE WILLIAM B. BOHLING, JUDGE

NOVEMBER 15, 1995
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Q. WHAT'S LOCATED THERE?

A. THAT'S CENTRAL SELF-STORAGE.

MR. BLAYLOCK: MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

Q. (BY MR. BLAYLOCK) WOULD YOU LOOK AT EXHIBITS 1, 2, 3, 4, AND 5; STATE'S EXHIBITS.

CAN YOU IDENTIFY THAT?

A. YES. THIS IS THE STORAGE FACILITY. OUR OFFICE IS ON THE EAST AND OUR APARTMENT IS RIGHT NEXT DOOR TO IT.

Q. AND YOU AND YOUR HUSBAND ARE MANAGERS THERE?

A. YES, WE ARE.

Q. HOW LONG HAVE YOU BEEN MANAGERS OF THAT FACILITY?

A. IT WILL BE SIX YEARS THIS COMING MAY.

Q. WHICH SIDE OF THE ROAD IS THAT STORAGE FACILITY LOCATED ON?

A. IT'S ON THE WEST. WELL, DO YOU WANT RIGHT OR LEFT? IT'S ON THE WEST SIDE OF THE ROAD.

Q. IT'S ON THE WEST SIDE OF THE ROAD?

A. YES, UH-HUH.

Q. WAS THERE A TIME EARLIER THIS YEAR WHEN THERE WAS A PROBLEM WITH LOCKS BEING CUT OFF STORAGE LOCKERS?

A. YES, THERE WAS.

Q. DO YOU RECALL WHEN THAT WAS?

A. IT WAS IN MARCH OF THIS YEAR, THE 29TH AND 30TH.

Q. DID YOU MAKE NOTES OF WHEN THAT OCCURRED?

A. YES. YES, WE DID.

Q. WILL YOU REFER TO THOSE NOTES IN GIVING ME THOSE TWO DATES?

A. YES, UH-HUH.

Q. TELL ME THE PROCEDURE THAT YOU NORMALLY GO THROUGH AS FAR AS A DAY. IF SOMEBODY HAS A STORAGE UNIT WITH YOU, HOW DO THEY GAIN ACCESS TO THAT STORAGE UNIT?

A. OUR HOURS ARE FROM 7 A.M. UNTIL 9:00 P.M. IN THE EVENING. AND WHEN OUR GATE IS OPEN, I'M IN THE OFFICE FROM 9 UNTIL 6. AND THE PROCEDURE IS THAT THE PEOPLE COME IN, SIGN IN ON A CLIPBOARD OUTSIDE MY OFFICE DOOR AND THEN PROCEED TO THEIR UNIT IN THE FACILITY.

Q. NOW, DOES IT HAVE TO BE THE INDIVIDUAL WHO SPECIFICALLY RENTS FROM YOU?

A. BASICALLY THAT WOULD BE VERY HARD TO POLICE AS INDIVIDUALS. THEY NEED TO HAVE A KEY, BUT WE DO SUPERVISE THE YARD.

Q. DO YOU KNOW A JACK JENNINGS OR JEFFERY SPRAGUE?

A. NO, I DON'T.

Q. HAVE YOU SEARCHED YOUR RECORDS TO DETERMINE IF EITHER OF THOSE TWO INDIVIDUALS WAS RENTING A FACILITY AT CENTRAL SELF-STORAGE?

SELF-LIMITING IN A LOT OF AREAS.

Q. THESE UNITS DO NOT HAVE LIGHTS IN THEM?

A. NO, THEY DO NOT.

Q. NOW, YOU INDICATED THAT THERE WAS A PROBLEM ON THE 29TH OF MARCH. WHEN DID THAT FIRST COME TO YOUR ATTENTION?

A. WHEN WE WERE NOTIFIED-- THE WEST JORDAN POLICE ACTUALLY NOTIFIED US-- THE GATE WAS OPEN.

MR. YOUNGBERG: JUDGE, I'M SORRY. IF I COULD INTERRUPT.

I WOULD OBJECT TO ANY MORE MENTION OF THE 29TH. JUDGE, THAT'S NOT THE CHARGE IN THIS. THAT'S BASED ON OUR CONVERSATION YESTERDAY, BUT FOR THE RECORD I WOULD OBJECT TO HER GOING INTO THE EVENTS OF THE 29TH.

THE COURT: OVERRULED.

MR. ANDERSON: I BELIEVE, FOR THE RECORD, I THINK I SHOULD JOIN THAT.

THE COURT: YOUR OBJECTION IS NOTED. THANK YOU, COUNSEL.

Q. (BY MR. BLAYLOCK) WHAT WAS YOUR ACTION UPON RECEIVING NOTIFICATION FROM WEST JORDAN POLICE?

A. WE GOT DRESSED-- WE WERE ASLEEP IN THE APARTMENT AND WE IMMEDIATELY GOT DRESSED AND MET THE OFFICERS AT THE FRONT OF THE FACILITY.

Q. DO YOU RECALL ABOUT WHAT TIME THAT WAS?

A. WHEN I LOOKED AT THE CLOCK RIGHT OVER OUR BED, ON THE HEADBOARD, IT SAID 2:18 P.M. IT WAS P.M.-- OR A.M. I BEG YOUR PARDON.

Q. WHAT DID YOU DO PERSONALLY, THEN?

A. I WENT INTO THE OFFICE.

MY HUSBAND IS VERY CONCERNED OVER MY WELL-BEING, AND SO HE SAID YOU STAY RIGHT HERE. DON'T YOU GO.

AND SO I WENT INTO THE OFFICE AND STAYED THERE, AND THEN THEY-- I GUESS-- WELL, HE AND THE OFFICERS TOOK CARE OF THE INSPECTION OF THE YARD.

Q. NOW, DID YOU OBSERVE OR DID YOU HAVE ANY PEOPLE THAT CAME AND--

A. YES.

Q. --TO THEIR UNITS?

A. YES. I WENT THROUGH AS THEY BROUGHT BACK THE NUMBERS, AS WES-- WESLEY IS MY HUSBAND. AS HE BROUGHT BACK THE NUMBERS OF THE UNITS, I TURNED ON MY COMPUTER AND PULLED UP IN THE COMPUTER LISTING-- YOU KNOW, THE INDIVIDUAL RENTAL SITUATION ON THE COMPUTER AND CALLED THE INDIVIDUALS THAT WERE CONCERNED, THE ONES THAT HAD BEEN CUT AND BROKEN INTO.

Q. WHY DID YOU DO THAT AT 2 O'CLOCK IN THE MORNING?

A. I FELT IF IT WAS ME I WOULD HAVE WANTED TO

KNOW. AND IT'S JUST-- I JUST FELT IT WAS GOOD BUSINESS.

Q. AND WHAT UNITS WERE THE UNITS THAT YOU CALLED ON?

A. MAY I?

Q. YES, IF YOU WOULD.

A. I CALLED-- TRIED TO GET, JOVONA-- DO YOU WANT NAMES OR JUST NUMBERS?

MR. YOUNGBERG: JUDGE, I'M SORRY TO INTERRUPT AGAIN. I'M GOING TO OBJECT TO THIS ON RELEVANCE GROUNDS.

ARE WE TALKING ABOUT THE 29TH?

THE WITNESS: NO. WE'RE TALKING ABOUT THE 30TH.

MR. YOUNGBERG: OKAY. SORRY.

THE WITNESS: I DO EVERYTHING THE SAME TODAY. THESE ARE THE UNITS OF THE 30TH. IF YOU WOULD LIKE TO SEE THEM, THE DATE IS HERE IN THE COMPUTER.

Q. (BY MR. BLAYLOCK) IF WE COULD TAKE ONE STEP BACK. I WANTED TO ASK YOU ABOUT WHAT UNITS ON THE 29TH WERE CALLED.

DID YOU CALL ABOUT THE UNITS ON THE 29TH?

A. YES, UH-HUH.

Q. CAN YOU TELL ME WHAT UNITS THOSE WERE?

MR. YOUNGBERG: OF COURSE THIS IS MY OBJECTION, JUDGE, TO THE RELEVANCE OF THAT. THESE ARE NOT CHARGED

IN THIS CASE, AND I DON'T SEE THAT THEY'RE RELEVANT, UNITS THAT WERE CALLED ON THE 29TH.

THE COURT: DO YOU WANT TO RESPOND, MR. BLAYLOCK?

MR. BLAYLOCK: EXCUSE ME?

THE COURT: AS TO THE OBJECTION AS TO RELEVANCE AS TO WHY YOU NEED IDENTIFICATION OF THE UNITS.

MR. BLAYLOCK: IT'S OUR ALLEGATION THAT ONE OF THESE UNITS WAS HIT BOTH NIGHTS. I WANT A LIST OF THE UNITS THAT WERE HIT, WHERE THEIR APPROXIMATE LOCATION WAS.

THE COURT: LOCATION WOULD MAKE IT RELEVANT. OVERRULED.

THE WITNESS: DO YOU WANT THOSE NUMBERS?

Q. (BY MR. BLAYLOCK) WE'RE TALKING ABOUT THE 29TH?

A. 29TH. 461, 659--

Q. AS WE GO ALONG, YOU HAVE LISTED THE RENTER OF THAT PARTICULAR UNIT; IS THAT CORRECT?

A. YES.

Q. AND 461 THE RENTER WAS?

A. DOUG PARKIN.

MR. YOUNGBERG: JUDGE, I THINK WE CAN STIPULATE THAT UNIT 711 WAS HIT ON BOTH NIGHTS, IF THAT WILL HELP. THAT WOULD BE THE ONLY UNIT.

THE WITNESS: THAT'S CORRECT.

DO YOU WANT TO GO BACK HERE?

Q. (BY MR. BLAYLOCK) YES.

A. I BEG YOUR PARDON.

652, FRED LUCERO; 464, ALVIN DAVENPORT; 462 IS ALFRED MEDINA, 463 WAS SHIRLEY PANTING. 653 IS DATA SERVICE, ROBERT RICE.

Q. 653?

A. YES, UH-HUH. 710, MICHAEL GALLAGOS AND 711 WAS CINDY BEARD.

Q. MARILYN, WILL YOU STEP DOWN HERE TO STATE'S EXHIBIT NUMBER ONE.

NOW, WOULD YOU SHOW-- CAN YOU SHOW US WHERE THOSE UNITS ARE?

A. THEY'RE ALL APPROXIMATELY IN THIS AREA. THIS IS 711. THIS IS 652, 653, 651. THEY'RE ALL IN THIS AREA, WHICH IS THE FURTHEST AREA FROM THE OFFICE AND THE APARTMENT. IT'S IN THIS CORNER.

Q. WOULD YOU JUST TAKE THIS PEN AND WRITE BY THOSE UNITS 3/29 RIGHT BY EACH OF THOSE UNITS.

A. (COMPLIES.)

Q. ARE YOU OKAY THERE?

A. I'M FINE.

Q. THANK YOU. DO YOU KNOW A CINDY BEARD WHO CAME OUT THAT NIGHT?

A. YES. WELL, YES, SHE DID. CINDY CAME. IT WAS VERY RAPIDLY. SHE BROUGHT ANOTHER LOCK TO PUT ON HER UNIT AND LOCKED IT AGAIN.

Q. DID YOU EVER GO OUT AND LOOK AT THIS UNIT?

A. NOT MYSELF, NO.

Q. NOT YOURSELF?

A. WESLEY DID.

Q. THEN THERE WAS A PROBLEM THE NEXT NIGHT?

A. YES, UH-HUH.

Q. NOW, IS THERE SOMEONE THAT CHECKS ALL THE LOCKERS DURING THE DAY?

A. YES. BOTH MY HUSBAND AND I DO. I GO AROUND 11-- BETWEEN 11:00 AND 12:30. I TRY NOT TO MAKE IT THE SAME TIME BECAUSE IT'S EASILY OBSERVED, BECAUSE I DRIVE THE GOLF CART, BECAUSE, YOU CAN SEE I'M, NOT TOO GOOD A WALKER. AND THEN HE GOES AGAIN BETWEEN 3:00 AND 3:30.

Q. NOW, DID ALL OF THOSE INDIVIDUALS RESPOND?

A. NOT ALL. NOT ALL. SOME OF THEM-- WELL, MICHAEL GALLEGOS, THERE WAS NO ANSWER. ALFRED MEDINA, I GOT A HOLD OF HIS MOTHER AND SHE AND HE CAME. THEY DID RESPOND, BUT NOT AT THAT MOMENT.

Q. NOT IMMEDIATELY?

A. NOT IMMEDIATELY.

Q. IF THEY DIDN'T COME THAT NIGHT, WHAT ACTION DID YOU TAKE?

A. WELL, BASICALLY WHAT WE DID WAS-- A GOODLY PORTION OF THEM CAME THE FOLLOWING DAY. THERE'S VICKI, VICKI GOFF, CAME THE FOLLOWING DAY BECAUSE SHE DIDN'T HAVE TRANSPORTATION THAT NIGHT.

Q. YOU'RE TALKING ABOUT THE 30TH, RIGHT?

A. NO, NO. I BEG YOUR PARDON. LET'S BACK UP. WHERE ARE WE THEN?

Q. OKAY. I'M JUST SAYING FOR THE 29TH, IF SOMEBODY DIDN'T COME OUT THAT NIGHT, WHAT DID YOU DO?

MR. YOUNGBERG: JUDGE, MAY I OBJECT AGAIN? I'M SORRY TO HAVE TO CONTINUE TO OBJECT TO THIS.

HOW DO INDIVIDUALS THAT WERE BURGLED ON THE 29TH, COMING OUT AND LOOKING AT THE PROPERTY, THE LOCATION-- AGAIN, I OBJECT ON RELEVANCE. I WON'T OBJECT AGAIN, BUT I WOULD LIKE A CONTINUING OBJECTION TO ANYTHING ON THE 29TH, BASED ON RELEVANCE. WE ESTABLISHED LOCATION, AND THAT'S MY OBJECTION.

THE COURT: MR. BLAYLOCK?

MR. BLAYLOCK: YOUR HONOR, THE QUESTION I WAS GOING TO ASK IS WHETHER OR NOT THEY PLACED LOCKS ON THOSE UNITS THAT WERE LEFT OPEN. I'M NOT GOING TO ASK ANY MORE QUESTIONS.

THE COURT: PROCEED.

THE WITNESS: YES.

Q. (BY MR. BLAYLOCK) DID YOU PLACE LOCKS ON THOSE

LOCKERS WHEN PEOPLE DIDN'T RESPOND?

A. YEP.

Q. I HADN'T ASKED YOU THAT?

A. THAT'S OKAY.

Q. SO ON THE 29TH, DURING THE DAY, YOU DROVE AROUND THE STORAGE UNITS?

A. UM-HUM.

Q. AND WHAT WERE YOU DOING AS YOU WERE DRIVING AROUND?

A. WELL, I GO DOWN-- USUALLY GO ON THE FAR AISLE. THAT'S THE 600 AISLE.

Q. YOU CAN STEP UP THERE IF THAT HELPS YOU.

A. OKAY. USUALLY I JUST CAME DOWN, YES.

Q. I HAVE A POINTER HERE, IF THAT MAKES IT EASIER.

A. THE WAY WE DO THESE, SOMETIMES PEOPLE GO WITHOUT PAYING THE RENT, SO THIS IS SOMETHING WE HAVE ALWAYS DONE. BUT I DRIVE DOWN THE AISLE AND YOU CAN SEE THE LOCKS ON THE DOOR. ANYTHING THAT HAS A DOUBLE LOCK ON IT I TAKE THE NUMBER DOWN, BECAUSE IT'S POSSIBLE WE HAVE LEFT AN OVER-LOCK ON IT. AND THEN WE COME DOWN IN THE CORNER AND CHECK, COME BACK UP THIS AISLE THE SAME WAY, GOING THE OTHER DIRECTION, CHECK THE ENDS. AND CHECK AS WE GO, COME CLEAR OUT AND DOWN THIS WAY, AND THIS WAY, JUST FOLLOWING A PATTERN. AND OF COURSE

THESE-- AS WE COME TO THE END OF THE AISLE AND THEN UP HERE, TOO, THESE ARE KIND OF COVERED AISLES, IS WHAT THEY ARE.

YOU HAVE TO GET OFF THE GOLF CART HERE AND WALK IN AND CHECK AS YOU GO IN TO MAKE SURE, AND THESE ON THE EDGE HERE ARE OPEN. BUT YOU HAVE TO GO INTO THESE LITTLE ONES HERE AND JUST KIND OF BACK UP, DRIVING MY GOLF CART. AND GO BACK INTO MY OFFICE.

Q. SO USING THAT PROCEDURE, WHAT DID YOU PERSONALLY FIND?

A. ON THE-- DURING THE DAYTIME?

Q. YEAH.

A. ON THE 29TH?

Q. YES.

A. 29TH, EVERYTHING WAS LOCKED UP THAT SHOULD HAVE BEEN.

Q. YOU FOUND NO LOCKS CUT OFF?

A. NO, NONE AT ALL.

Q. AND WERE ANY OF THOSE UNITS OVER-LOCKED AT THAT POINT?

A. ONE.

Q. WHICH ONE WAS THAT?

A. JOVONA O'CONNOR, 308 OR 309.

Q. DO YOU NEED TO REFER TO THESE SPECIFICALLY?

A. SORRY. I HATE TO ADMIT MY AGE TO PEOPLE, BUT

Addendum F

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900791

JACK CHRISTOPHER JENNINGS,

DEFENDANT,

STATE OF UTAH,

PLAINTIFF,

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JEFFREY SPRAGUE,

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Q. AND WHO WAS THAT WITH?

A. WEST VALLEY CITY.

Q. DO YOU HAVE ANY SPECIAL ASSIGNMENTS WITH WEST JORDAN? OR DID YOU ON THE 30TH OF JUNE-- MARCH 29TH AND 30TH OF MARCH?

A. I WAS ON PATROL.

Q. WITH YOUR SENIORITY YOU PROBABLY HAD THE LATE SHIFT; IS THAT THE WAY IT WORKS?

A. YES. I WAS IN TRAINING.

Q. LET'S TALK ABOUT THE 29TH OF MARCH. ARE YOU FAMILIAR WITH THE CENTRAL SELF-STORAGE UNIT THERE?

A. YES.

Q. WHERE IS THAT?

A. 7210 SOUTH STATE-- OR SOUTH REDWOOD ROAD.

Q. WHERE IS THAT IN RELATIONSHIP TO THE POLICE STATION?

A. THE POLICE STATION IS 8000 SOUTH REDWOOD ROAD. IT'S ABOUT EIGHT BLOCKS.

Q. DID YOU NOTICE ANYTHING OUT OF THE ORDINARY ON THE 29TH OF MARCH IN THE EARLY MORNING HOURS?

A. YES, I DID.

Q. WHAT WAS THAT?

A. I NOTICED A GATE WAS OPEN ON THE STORAGE UNIT. THE GATE WAS USUALLY CLOSED AND LOCKED.

MR. BLAYLOCK: MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

Q. (BY MR. BLAYLOCK) WOULD YOU LOOK AT EXHIBITS 2, 3, 4 AND 5. DO THESE FAIRLY DEPICT CENTRAL SELF-STORAGE UNIT?

A. YEAH, STORAGE UNIT, THAT I SEEN THAT NIGHT.

Q. WHAT DID YOU DO WHEN YOU FOUND THE GATE OPEN?

A. WHICH NIGHT IS THIS?

Q. THE 29TH.

A. THE 29TH?

Q. YEAH. THE FIRST NIGHT.

A. FIRST NIGHT?

Q. YEAH.

A. OKAY. I DROVE PAST. I WAS NORTHBOUND. I LOOKED OVER AND NOTICED THE GATE OPEN. I THOUGHT IT WAS PECULIAR, SO I TURNED AROUND AND I DROVE BACK INTO THE PARKING LOT, LOOKED AT IT, SLOWED DOWN, HAD A FLOOD THERE AND DROVE UP TO THE GATE.

AT THAT TIME I COULD SEE THAT THE GATES WERE OPEN. AND THERE WAS A CHAIN LAYING THERE ON THE GROUND SO I COULD TELL AT THAT TIME THAT THE LOCK HAD BEEN CUT OFF AND SOMEONE HAD BEEN IN THERE.

Q. DID YOU HAVE CONTACT WITH THE MANAGERS OF THE FACILITY?

A. AFTER THAT. WE DROVE THROUGH THE COMPLEX TO SEE WHETHER THERE WAS ANYBODY STILL INSIDE AND WE NOTICED

SOME OF THE STORAGE UNITS IN THE BACK HAD BEEN CUT OFF--
THE LOCKS HAD BEEN CUT OFF. THE DOORS WERE OPEN A LITTLE
BIT. SOME WERE OPEN ALL THE WAY. SOME WERE SLIGHTLY
OPEN. WE WENT AND CONTACTED THE MANAGERS AFTER THAT WHEN
WE DETERMINED THERE WAS NOBODY INSIDE STILL.

MR. BLAYLOCK: MAY I APPROACH AGAIN, YOUR HONOR?

THE COURT: YOU MAY.

Q. (BY MR. BLAYLOCK) WOULD YOU LOOK AT STATE'S EXHIBIT 8-S. IS THAT ONE OF THE STORAGE UNITS YOU SAW ON THE 29TH THAT WAS OPEN?

A. YEAH. I REMEMBER THAT ONE. STUFF WAS SLIGHTLY TAKEN OUT OF THAT ONE.

Q. DOES THAT APPEAR AS YOU SAW IT ON THE 29TH?

A. YEAH.

Q. LET'S GO NOW TO THE 30TH OF MARCH. WHAT HAPPENED ON THE 30TH OF MARCH IN THE EARLY MORNING HOURS?

A. THE 30TH OF MARCH, THAT'S WHAT PRETTY MUCH APPEARS THE NIGHT BEFORE, JUST ON PATROL. I DROVE BY AGAIN IN THE SAME DIRECTION AND LOOKED OVER AT THE GATE AND NOTICED THE GATE WAS OPEN AGAIN. THIS TIME THE GATE WAS ALL THE WAY OPEN, AND I TURNED TO THE OTHER OFFICER AND SAID, OH, THE GATE IS OPEN AGAIN. SO WE TURNED AROUND AND WENT BACK IN.

Q. NOW, YOU SAY THE OTHER OFFICER. WHO WAS WITH

YOU?

A. I WAS WITH OFFICER SCOTT RICKS BOTH NIGHTS.

Q. WHAT DID YOU FIND?

A. I FOUND THAT THE GATE HAD BEEN OPENED, THE LOCK HAD BEEN CUT OFF OF IT AGAIN. AND WHEN WE GOT THERE I GOT OUT OF THE VEHICLE, AT THE GATE, AND STAYED THERE WHILE OFFICER RICKS DROVE THROUGH THE COMPLEX. AND I KNOCKED ON THE DOOR TO LET THE MANAGERS KNOW. WHILE WE WERE WAITING FOR THEM TO COME OUT, I WAS DRIVING AROUND TO THE REAR BECAUSE IT IS QUITE A LONG DRIVE TO THE BACK.

Q. OFFICER BENZON, WILL YOU STEP UP HERE TO STATE'S EXHIBIT NUMBER 1. YOU CAN STEP DOWN HERE. MAYBE THAT WOULD BE EASIER.

DOES THAT FAIRLY REPRESENT CENTRAL SELF-STORAGE?

A. YES. THAT'S A REAL GOOD REPRESENTATION.

Q. WHERE IS REDWOOD ROAD FROM THERE?

A. REDWOOD ROAD IS RIGHT HERE.

Q. NOW, YOU SAY THAT YOU GOT OUT OF THE VEHICLE AND STOOD WHERE?

A. WE PULLED IN TO HERE. THE GATE IS RIGHT HERE ALONG-- OR THE GATE COMES THROUGH, THROUGH THERE. I STOOD HERE AND KNOCKED ON THE MANAGERS' DOOR.

SCOTT, OFFICER RICKS, DROVE THROUGH THE BACK HERE. I WALKED DOWN HERE TO SEE IF I COULD FIND

Addendum G

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A. YES.

Q. WHO DID YOU HAVE WITH YOU?

A. OFFICE BENZON.

Q. ON THE 29TH-- ARE YOU FAMILIAR WITH THE CENTRAL SELF-STORAGE AREA?

A. YES, I AM.

Q. WHERE IS THAT LOCATED?

A. APPROXIMATELY 7200 SOUTH AND REDWOOD ROAD.

Q. DID YOU HAVE SOMETHING THAT CAUGHT YOUR ATTENTION THERE ON THE 29TH OF MARCH?

A. YES, I DID.

Q. WHAT WAS IT?

A. WE WERE DRIVING SOUTHBOUND ON REDWOOD ROAD AND WE NOTICED AN OPEN GATE AT THE FACILITY. AND THE THING THAT BROUGHT IT TO OUR ATTENTION WAS THAT WE HAD A SIMILAR INCIDENT THE NIGHT BEFORE. SO WE DROVE IN TO INVESTIGATE THE OPEN GATE.

Q. SO ARE WE TALKING ABOUT THE 30TH?

A. YES.

Q. OKAY. TELL ME ABOUT THE 29TH.

A. I'M SORRY-- THE 29TH. SAME AREA. WE WERE PATROLLING THE SAME AREA AND WE OBSERVED AN OPEN GATE. AND THE REASON THAT WAS BROUGHT TO OUR ATTENTION ON THE 29TH IS THIS GATE IS USUALLY NOT OPEN. AND WHEN WE DISCOVERED THIS, WE NOTICED A LOCK LYING ON THE GROUND

WHERE THE TWO GATES COME TOGETHER.

WE THEN PROCEEDED TO GO IN AND DISCOVERED THAT SEVERAL STORAGE FACILITIES ALSO HAD THEIR LOCKS CUT OFF TOWARDS THE REAR OF THE FACILITY AND THE DOORS TO THE STORAGE FACILITY WERE OPEN.

Q. SO THAT HAPPENED ON THE 29TH?

A. YES.

Q. DO YOU RECALL WHAT AREA THESE CUT LOCKS WERE IN THAT STORAGE FACILITY?

A. I BELIEVE THEY WERE MOSTLY TOWARDS THE BACK, PROBABLY THE SOUTHWEST-- KIND OF A CORNER OF THE FACILITY WHERE MOST OF THEM ARE.

Q. NOW, TELL ME ABOUT THE 30TH OF MARCH.

A. ON THE 30TH OF MARCH, AGAIN AT APPROXIMATELY 2 O'CLOCK IN THE MORNING, WE WERE AGAIN PATROLLING THE AREA AND AGAIN OBSERVED AN OPEN GATE. AND BECAUSE OF THE NIGHT BEFORE, WE PULLED IN TO INVESTIGATE AGAIN AND FOUND A CUT LOCK LYING BASICALLY IN THE SAME AREA.

Q. WHERE WAS THAT?

A. RIGHT WHERE THE TWO GATES COME TOGETHER-- THE LOCK WAS LAYING SOMEWHERE IN THAT AREA.

Q. OFFICERS RICKS, IF YOU WOULD STEP DOWN AND WOULD YOU LOOK AT THIS DIAGRAM. SAYS CENTRAL SELF-STORAGE, STATE'S EXHIBIT NUMBER 1.

A. YES.

Addendum H

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A. YES.

Q. AND YOU TOGETHER, WHAT IS YOUR OCCUPATION?

A. WE MANAGE CENTRAL SELF-STORAGE, WEST JORDAN.

Q. HOW LONG HAVE YOU BEEN THE MANAGERS OF THE CENTRAL SELF-STORAGE?

A. IT'S ABOUT FIVE AND A HALF YEARS NOW. IT'S OVER FIVE AND A HALF.

Q. DID YOU HAVE A PROBLEM THERE LATE MARCH 29TH AND 30TH OF THIS YEAR?

A. WE SURE DID.

Q. WHAT WAS THE PROBLEM?

A. WELL, WE WERE AWAKENED ABOUT 2 A.M. BY WEST JORDAN POLICE OFFICERS, AND OUR GATE LOCK HAD BEEN CUT AND SEVERAL UNITS HAD BEEN OPENED. AND SO WE GOT UP AND DID WHAT WE COULD.

Q. DID THAT OCCUR BOTH NIGHTS?

A. YES.

Q. NOW, DIRECTING YOUR ATTENTION TO THE 30TH OF MARCH, TELL ME WHAT HAPPENED THEN. WHEN DID YOU FIRST UNDERSTAND THAT THERE MIGHT BE A PROBLEM?

A. WELL, WE WERE ASLEEP AND THE KNOCK CAME ON THE DOOR. IT WAS ONE OF THE OFFICERS AND WE WERE KIND OF-- FROM THE NIGHT BEFORE WE WERE A LOT MORE PREPARED AND WE WERE ABLE TO GET RIGHT OUT THERE AND START TO WORK WITH THEM TO FIND OUT WHAT UNITS HAD BEEN CUT AND, YOU KNOW,

WHAT HAPPENED.

Q. DID THIS HAPPEN BEFORE THEN?

A. WE HAD NEVER HAD A PROBLEM IN ALL THE TIME WE HAD BEEN THERE UP UNTIL THE 29TH OF MARCH AND THE 30TH OF MARCH.

Q. NOW, ON THE DAY OF THE 29TH, BEFORE THE MORNING OF THE 30TH, DID ANYBODY CHECK-- WHY DON'T YOU STEP DOWN, WESLEY, AND TAKE A LOOK AT DIAGRAM S-1.

DOES THAT REPRESENT CENTRAL SELF-STORAGE AS IT SITS?

A. THAT'S THE MAP WE KEEP IN THE OFFICE TO SHOW PEOPLE WHERE TO FIND UNITS.

Q. DID YOU IN FACT PROVIDE US WITH THAT MAP?

A. YES.

Q. WHICH DIRECTION IS NORTH ON THAT MAP?

A. NORTH IS RIGHT OUT HERE.

Q. THAT WOULD BE TO THE LEFT?

A. YEAH.

Q. AND REDWOOD ROAD WOULD BE AT THE TOP OF THE MAP?

A. YEAH. RIGHT HERE.

Q. DID YOU OR ANYBODY ELSE ON THE DAY OF THE-- AFTER THE PROBLEMS ON THE 29TH IN THE EARLY MORNING, CHECK THESE LOCKERS AND MAKE SURE THAT THERE WERE LOCKS ON ALL THE LOCKERS?

A. WELL, EVERY MORNING ABOUT 7 O'CLOCK, A LITTLE AFTER, I GO OUT AND I WALK. I COME RIGHT ACROSS HERE AND CHECK ALL THE LOCKS. I GO DOWN HERE, GOING BACK UP THIS SIDE AND JUST CHECK EVERY LOCK, AND TAKE A LIST AND EVERY UNIT THAT'S UNLOCKED, UNLESS I KNOW THAT IT'S OPEN AND WHAT WAS IN THERE THE NIGHT BEFORE, I OPEN IT TO SEE WHAT THE SITUATION IS.

Q. DID YOU DO THAT THEN ON THE 29TH?

A. ON THE MORNING OF THE 30TH.

Q. WHAT DID YOU FIND? AGAIN WE'RE TALKING ABOUT THE MORNING OF THE 29TH AND THEN THE SECOND BREAK-IN WAS THE MORNING OF THE 30TH; IS THAT CORRECT?

A. YEAH.

Q. DID YOU FIND THAT THERE WERE ANY LOCKS MISSING ON ANY OF THOSE LOCKERS AT THAT TIME?

A. NO. NO EVERYTHING WAS LOCKED THAT WAS SUPPOSED TO BE LOCKED EXCEPT IN THE-- AT NIGHT WHEN I WENT OUT WITH THE OFFICERS.

Q. SO ABOUT TWO O'CLOCK IN THE MORNING-- HOW MANY TIMES DID YOU CHECK THOSE LOCKERS?

A. OH, I DO IT AT VARIOUS TIMES, EXCEPT THE ONE TIME AT SEVEN IN THE MORNING, I MIGHT GO THROUGH TWO OR THREE TIMES A DAY. THE WIFE MIGHT GO THROUGH AND LOOK. WE JUST TRY TO KEEP THINGS OFF GUARD AND WATCH WHAT WE'RE DOING.

Q. DO YOU RECALL HOW MANY TIMES YOU WENT THROUGH ON THAT DAY BEFORE THE SECOND BURGLARY?

A. I COULDN'T SAY EXACTLY.

Q. AND WHY DON'T YOU GO AHEAD AND HAVE A SEAT THERE FOR A MINUTE.

WHAT IS YOUR PROCEDURE AS FAR AS LOCKING THE FACILITY? WHEN IS THE FACILITY OPENED?

A. THE GATE-- IT'S ADVERTISED IT WAS-- THERE WAS A SIGN UP AT THE TIME. I'M IN THE PROCESS OF PUTTING A NEW SIGN FOR OUR NEW GATE. BUT THE SIGN SAYS "GATE OPENS 7 A.M. AND CLOSES AT 9 P.M."

IT'S ON OUR CARDS. THAT'S OUR PRACTICE.

Q. IS ANYONE AUTHORIZED OTHER THAN YOU TO BE IN THERE AFTER 9:00 P.M.?

A. NO.

Q. IS ANYONE, UNDER ANY CIRCUMSTANCES, AUTHORIZED TO BE IN THERE AT 2 O'CLOCK IN THE MORNING OR BEFORE 2 O'CLOCK IN THE MORNING?

A. NO.

Q. WHAT DID YOU FIND AS YOU AROSE ON THE MORNING OF THE 30TH ABOUT 2 O'CLOCK?

A. WE FOUND SEVERAL-- WHEN I WENT OUT WITH THE OFFICERS WE WENT DOWN INTO THE AREA WHERE THE BREAK-INS WERE AND WE CHECKED EACH AND EVERY LOCK. AND THEN AT THAT TIME I AGAIN GOT ON THE CART, WITH A FLASHLIGHT, AND

DOOR WAS WIDE OPEN ON THAT ONE.

Q. 706.

A. YES. THE DOOR WAS OPEN. THE LOCK WAS CUT.

Q. 707?

A. YES, THE SAME THING.

Q. 708?

A. 708 WAS THERE TOO, THAT'S RIGHT.

Q. 711?

A. AND 711.

Q. AS A MATTER OF FACT THERE HAD BEEN A PROBLEM WITH 711 THE NIGHT BEFORE ALSO?

A. THE NIGHT BEFORE, YES. I WAS DOWN WITH CINDY AND HER HUSBAND AND WE OPENED EVERYTHING UP AND LOOKED IN AND THEN WHEN WE OPENED IT THE NEXT NIGHT, RAISED THE DOOR UP ALL THE WAY WE COULD SEE THAT THERE WAS THINGS THAT WERE MISSING FROM THE NIGHT BEFORE.

Q. YOU PERSONALLY OBSERVED THAT?

A. YES. SHE WAS POINTING THAT OUT AND I COULD REMEMBER STUFF THAT WAS IN THERE, YOU KNOW. I COULDN'T TELL YOU WHAT IT WAS BECAUSE THEY KIND OF HAD IT COVERED, BUT, YEAH, I SAW THIS, IT WAS STUFF MISSING.

Q. DIRECTING YOUR ATTENTION TO PICTURES, 8-S AND 9-S, WHICH OF THOSE WOULD BE ON THE 29TH AND WHICH OF THOSE WOULD BE ON THE 30TH?

A. IF I REMEMBER RIGHT, THE BLANKET HERE WAS--

THIS WAS DOWN ON THE 29TH. SO THAT WOULD BE 9-S WAS ON THE 29TH AND THE OTHER ONE IS ON THE 30TH.

Q. IS THERE A DIFFERENCE IN ITEMS MISSING FROM THAT ONE?

A. IT SEEMED TO ME THAT THE BLANKET WAS THERE-- NO. THAT'S RIGHT.

Q. DOES 8 SHOW PROPERTY THAT'S NOT THERE?

A. THAT'S RIGHT. AND THE BLANKET WAS OVER THERE THAT NIGHT.

Q. 29TH?

A. YES. I REMEMBER-- THIS IS THE WAY IT LOOKED THE FIRST NIGHT.

Q. AND THAT'S 8-S?

A. THAT'S 8-S, YES. THAT'S RIGHT.

Q. NOW, WERE ANY OF THOSE UNITS OVER-LOCKED?

A. 309 IS THE ONLY UNIT THAT WAS OVER-LOCKED.

Q. AND WHOSE WAS THAT?

A. THAT WAS JOVONA O'CONNOR.

Q. WHEN IT'S OVER-LOCKED WHO HAS A RIGHT TO THE PROPERTY IN THE UNIT?

A. THE COMPANY AND THE MANAGER.

I HAD A LOCK ON IT. SHE WAS BEING-- I DON'T KNOW WHEN THE AUCTION WOULD HAVE BEEN, BUT WE WERE PREPARING FOR AN AUCTION.

MR. BLAYLOCK: MAY I APPROACH, YOUR HONOR?

Addendum I

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900791

JACK CHRISTOPHER JENNINGS,

DEFENDANT,

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900792

JEFFREY SPRAGUE,

DEFENDANT.

BEFORE THE HONORABLE WILLIAM B. BOHLING, JUDGE

NOVEMBER 14, 1995

REPORTER'S TRANSCRIPT ON APPEAL

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OKAY. COUNSEL, ANYTHING THAT WE NEED TO DEAL WITH?

MR. ANDERSON: YOUR HONOR, YOU SUGGESTED THAT COUNSEL COME BACK 10 MINUTES EARLY. WE WOULD LIKE TO PUT ON THE RECORD THAT THE DISCUSSION WE HAD REGARDING THE SCOPE OF YOUR RULING THIS MORNING-- REMEMBER THE OFF-THE-RECORD DISCUSSION ABOUT THE BURGLARY THAT OCCURRED ON MARCH 29TH-- WE THINK WE REALLY NEED TO GET THAT ON THE RECORD.

MR. BLAYLOCK: YOUR HONOR, WHAT IS THE COURT'S PLEASURE WITH REGARDS TO WHEN WE START TOMORROW?

THE COURT: LET'S SHOOT FOR 9:30.

MR. BLAYLOCK: AT 9:30?

THE COURT: WE HAVE A TRO IN THE MORNING BEFORE THAT.

MR. BLAYLOCK: OKAY.

THE COURT: OKAY. WE'LL BE IN RECESS. I WANT YOU HERE AT 2:20. LET'S GET GOING AT 2:20.

(LUNCH RECESS TAKEN.)

SALT LAKE CITY, UTAH; TUESDAY, NOVEMBER 14, 1995; P.M.

P R O C E E D I N G S

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUTSIDE THE PRESENCE OF THE JURY.)

THE COURT: COUNSEL, HOW EARLY ARE YOU PREPARED TO START TOMORROW MORNING?

MR. YOUNGBERG: I HAVE A PLEA TOMORROW MORNING WITH JUDGE WILKINSON.

THE COURT: I THINK WE BETTER START NO LATER THEN 8:30. LET'S DO THAT AND GET THE JURY GOING AGAIN AS EARLY AS WE CAN TO GET BACK SOME OF THE TIME WE LOST TODAY.

I'M WONDERING IF IT WOULDN'T BE A GOOD IDEA TO ALLOW HIM-- ON YOUR APPLICATION TO THE COURT FOR A RECORD ON THE DECISION EARLIER, YOU HAVE TWO OPPORTUNITIES TO WIN. CLEARLY, WHAT YOU'RE ASKING FOR IS A MOTION IN LIMINE, IF I UNDERSTAND IT.

MR. ANDERSON: YES.

THE COURT: WHAT I WOULD BE INCLINED TO DO, MAKING A RECORD BASED ON THE RULES OF CRIMINAL PROCEDURE WHICH PROHIBITS SUCH A MOTION TO BE MADE THAT'S NOT IN WRITING, THAT HAS NOT GIVEN THE COURT PROPER NOTICE. I THINK THE RULE IS RULE 12(B)(2), BUT LET ME BE SURE ABOUT THAT.

THAT IS CORRECT.

IT SEEMS TO ME THAT YOU CERTAINLY RETAIN THE RIGHT TO MAKE AN OBJECTION TO ANY EVIDENCE THAT YOU THINK IS INAPPROPRIATE, AND WHAT I WOULD DO, TO AVOID BELABORING THE RECORD BEFORE THE JURY, IF THERE'S A MATTER THAT COMES UP THAT YOU DISAGREE WITH, THEN I THINK YOU SHOULD MAKE YOUR OBJECTION, AND YOU CAN APPROACH THE BENCH AND THEN WE CAN LOOK AT IT AND SEE. IF THIS IS ONE OF THOSE AREAS THAT NEED TO BE GIVEN A FURTHER LOOK, THEN I WILL ALLOW YOU TO PUT YOUR OBJECTION ON THE RECORD OUT OF THE PRESENCE OF THE JURY AND GIVE YOU A CHANCE TO GIVE SOME ARGUMENT. AND THAT WILL GIVE YOU A CHANCE TO MAKE YOUR RECORD, AS I THINK IS APPROPRIATE TO THE EVIDENCE AS PRESENTED, AS TO THE MOTION THAT WASN'T FILED, AS THE RULE WOULD PROVIDE.

IS THERE ANY PROBLEM WITH THAT?

MR. ANDERSON: THAT'S ACCEPTABLE.

MR. YOUNGBERG: FINE, JUDGE.

THE COURT: LET'S BRING THE JURY IN.

MR. ANDERSON: YOUR HONOR, I ASK THAT THE EXCLUSIONARY RULE BE INVOKED.

THE COURT: LADIES AND GENTLEMEN WHO ARE IN THE COURTROOM, ARE THERE ANY WITNESSES HERE? SEVERAL.

WE'RE GOING TO-- IT HAS BEEN REQUESTED BY ONE OF THE PARTIES, AS IS APPROPRIATE, TO INVOKE THE

THE CASE EITHER ORALLY OR IN WRITING OR OTHERWISE, AND NOT TO COMMUNICATE YOURSELF WITH ANYONE ABOUT THE CASE AND NOT TO BEGIN YOUR DELIBERATIONS.

WE'LL BE IN RECESS UNTIL TOMORROW AT 8:30 IN THE MORNING, AND I LOOK FORWARD TO SEEING YOU THEN. I ENCOURAGE YOU TO COME IN AT 8:20, AND I WILL ASK THE BAILIFF TO BRING YOU DOUGHNUTS, SO YOU'LL HAVE SOMETHING TO LOOK FORWARD TO.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUTSIDE THE PRESENCE OF THE JURY.)

THE COURT: LET THE RECORD SHOW THE JURY HAS LEFT THE COURTROOM.

MR. ANDERSON, WHY DON'T YOU PUT ON THE RECORD YOUR OBJECTION.

MR. ANDERSON: YOUR HONOR, AT SIDE BAR I OBJECTED TO THE INTRODUCTION OF STATE'S EXHIBIT NUMBER 8 WHICH DEPICTS A STORAGE FACILITY WITH AN OPEN DOOR, NUMBER 711; ALSO DEPICTS, HOWEVER, STORAGE FACILITY NUMBER 710. THERE IS A DATE OF 3/29/95, WHICH IS A BURGLARY-- PICTURE TAKEN FOLLOWING A BURGLARY ON THAT DATE. AND THE DEFENDANT MR. JENNINGS IS NOT CHARGED WITH BURGLARY ON THE 29TH.

I ARGUED TO THE COURT AT SIDE-BAR THAT THE PREJUDICIAL EFFECT OUTWEIGHED THE PROBATIVE VALUE IN

BRINGING ANOTHER STORAGE FACILITY IN. I HAVE OBJECTED PREVIOUSLY AND RENEW THE OBJECTION TO ANY EVIDENCE RELATING TO THE BURGLARY THAT OCCURRED ON THE 29TH OF MARCH. I THINK THAT ITS PROBATIVE VALUE IS MINIMAL COMPARED TO THE PREJUDICIAL EFFECT TO MR. JENNINGS, BECAUSE IT'S MY UNDERSTANDING THE STATE EVEN ADMITTED THAT THERE'S NO EVIDENCE THAT THEY HAVE UNDER THE CIRCUMSTANTIAL NATURE OF TWO BACK-TO-BACK BURGLARIES-- THE STATE HAS NO EVIDENCE TO CONNECT MR. JENNINGS TO THAT AND THE INFERENCE TO THE 29TH BURGLARY IS HIGHLY PREJUDICIAL.

THE COURT: MR. YOUNGBERG, DO YOU JOIN IN THAT OBJECTION?

MR. YOUNGBERG: I JOIN THE OBJECTION.

THE COURT: MR. BLAYLOCK, DO YOU WANT TO RESPOND?

MR. BLAYLOCK: YOUR HONOR, THIS WAS VERY RELEVANT BECAUSE IT ALLOWED THIS WITNESS TO SHOW WHAT WAS THERE THE NIGHT BEFORE WHEN SHE WAS THERE AT THE STORAGE FACILITY, THAT LOCKER 711, AND WHAT WAS NOT THERE, IN THE PICTURE IN THE STORAGE FACILITY IN THE PICTURE FOLLOWING THAT. SO I SUGGEST THAT IT WAS PROBATIVE AND NOT PREJUDICIAL. THE COURT HAS RULED THAT IN OVERRULING THE OBJECTION THAT THE PHOTOGRAPH APPEARED TO THE COURT TO BE RELEVANT AND TO BE PROBATIVE AND THAT ITS PROBATIVE VALUE

FAR OUTWEIGHS ANY PREJUDICIAL EFFECT.

AND I THINK THAT WAS BORNE OUT BY THE WAY IN WHICH THE EVIDENCE WAS UTILIZED BY THE WITNESS TO EXPLAIN HER TESTIMONY AND TO INFORM THE JURY.

THE COURT: WE'LL BE IN RECESS UNTIL TOMORROW AT 8:30.

COUNSEL, I WOULD ENCOURAGE YOU-- I THINK I'VE GOT THE JURY INSTRUCTIONS FROM THE DEFENDANTS, MR. BLAYLOCK.

MR. BLAYLOCK: I APOLOGIZE TO THE COURT. I INTENDED TO USE UP THE LUNCH HOUR TODAY TO FINISH THOSE UP. AS OUR TIME WAS SHIFTED CONSIDERABLY I DID NOT HAVE THE OPPORTUNITY. I DID NOT EVEN HAVE A CHANCE TO EAT.

THE COURT: WE DIDN'T TAKE VERY MUCH OF A LUNCH HOUR.

COUNSEL, I SUGGEST THAT YOU GET TOGETHER BEFORE WE GO IN SESSION TOMORROW AND SEE IF YOU CAN WORK OUT ESSENTIALLY A STIPULATION. DO YOU HAVE ANY OBJECTION-- IF YOU HAVE ANY OBJECTION, I WANT YOU THEN TO BRING THOSE TO THE COURT'S ATTENTION AT NOON TOMORROW AND I HOPE WE CAN GET THE JURY OUT TOMORROW SO WE CAN GET THIS CONCLUDED BY THEN. AND YOU CAN START WITH THE COURT'S STOCK INSTRUCTIONS AS YOUR BASIS.

MR. YOUNGBERG: JUDGE, FOR THE RECORD, I JUST SUBMITTED TWO OR THREE THAT I WANTED IN ADDITION TO YOUR

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

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JACK CHRISTOPHER JENNINGS,

DEFENDANT,

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900792

JEFFREY SPRAGUE,

DEFENDANT.

BEFORE THE HONORABLE WILLIAM B. BOHLING, JUDGE

NOVEMBER 15, 1995
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NOTHING MORE THAN THE FACT THAT THERE WAS A DISTURBANCE. AND I BELIEVE ON THAT BASIS, THAT FROM THIS, THE JURY COULD INFER THAT THERE HAD BEEN ENTRY INTO THE OTHERS. AND I THINK THAT THE-- THEREFORE THE STATE HAS MET AT LEAST THE BURDEN OF SUBMITTING IT TO THE JURY, AND SO THE COURT IS WILLING TO ACKNOWLEDGE THAT THE EVIDENCE IS VERY THIN, AND MAY RECONSIDER THE ISSUE ON POST TRIAL MOTIONS; BUT AT THIS POINT I'M SATISFIED THE STATE MET ITS BURDEN AND WILL SUBMIT IT TO THE JURY, AND I'M GOING TO DENY THE MOTION.

ANYTHING ELSE?

MR. YOUNGBERG: I DON'T BELIEVE SO, JUDGE.

AT SOME POINT WE STILL HAVE TO PUT ON THE RECORD THE OBJECTION TO THE 29TH TESTIMONY, BUT IF YOU WANT TO PUSH AHEAD, I SUPPOSE WE CAN START CALLING OUR WITNESSES.

THE COURT: I THINK WHAT I WANT TO DO IS I WANT TO GET THIS CASE SUBMITTED TO THE JURY AS SOON AS WE CAN DO IT. AND AS SOON AS THAT'S DONE I WOULD INVITE COUNSEL TO PUT EVERYTHING ON THE RECORD.

MR. YOUNGBERG: ALL RIGHT.

MR. BLAYLOCK: JUDGE, SO THAT THERE ISN'T ANY QUESTION ABOUT THAT ON BEHALF OF THE STATE, WE WOULD STIPULATE THAT WOULD HAVE BEEN TAKEN EARLIER IN THE TRIAL AND IT'S ONLY BECAUSE OF THE PRESS OF GETTING THIS THING

BEFORE THE JURY IN A TIMELY FASHION, AND SO THEY ARE NOT GIVING UP ANYTHING BY DELAYING PUTTING THAT ON THE RECORD. SO THAT'S CLEARLY STATED SO THERE ISN'T ANY QUESTION ABOUT WAIVER.

THE COURT: THE COURT WOULD RECOGNIZE IT IN THE SAME FASHION.

NOW, LET'S GET THE JURY BACK IN.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY.)

THE COURT: THE RECORD MAY SHOW THE JURY IS PRESENT IN THE COURTROOM, COUNSEL AND THE PARTIES ARE PRESENT.

MR. YOUNGBERG: JUDGE, FOR OUR FIRST WITNESS WE WOULD LIKE TO CALL MICHELLE BRANDI SPRAGUE.

MICHELLE BRANDI SPRAGUE

CALLED AS A WITNESS IN BEHALF OF THE DEFENDANTS, HAVING FIRST BEEN DULY SWORN, WAS EXAMINED AND TESTIFIED UPON HER OATH AS FOLLOWS:

DIRECT EXAMINATION

BY MR. YOUNGBERG:

Q. WOULD YOU PLEASE INTRODUCE YOURSELF TO THE JURY.

A. MY NAME IS BRANDI SPRAGUE.

Q. AND HOW LONG HAVE YOU KNOWN JEFFERY SPRAGUE?

IMPORTANT THAT COUNSEL BE PRESENT AND WE WILL DISCUSS WHAT RESPONSE IS APPROPRIATE.

MR. ANDERSON: I HAVE ONE BRIEF MOTION BEFORE WE ADJOURN. I'LL MAKE THIS VERY BRIEF.

I WOULD MOVE THAT, AS RELATED TO MR. JENNINGS, AS THE RESULT OF SOME COMMENTS IN THE FINAL ARGUMENT OF MR. BLAYLOCK MOVE FOR A MISTRIAL, AND SPECIFICALLY WHEN HE READ INSTRUCTION NUMBER 17, REFERRING TO THE MENTAL STATE REQUIRED THAT A PERSON DIRECTLY COMMITS THE OFFENSE, SOLICITS, REQUESTS, ENCOURAGES, AND THEN IMMEDIATELY AFTER READING THAT INSTRUCTION HE GAVE A HYPOTHETICAL SCENARIO HOW MR. JENNINGS WENT AND BABY-SAT SO THE COUPLE COULD GO OUT AND BURGLARIZE AND THEN CAME BACK AND PICKED HIM UP. I THINK THAT CAN PLACE IN THE JURY'S MIND AN ARGUMENT THAT WOULD ALLOW THEM TO CONVICT MR. JENNINGS ON LEGALLY INSUFFICIENT GROUNDS.

THE COURT: MR. BLAYLOCK?

MR. BLAYLOCK: YOUR HONOR, I THINK IT'S A FAIR COMMENT IN MY ARGUMENT. COUNSEL STATED THAT THESE ARE VERY CLOSE FRIENDS, AND I THINK IT'S AN ISSUE THE JURY CAN CONSIDER. HOW MUCH KNOWLEDGE HE HAD, WHETHER OR NOT HE HAD KNOWLEDGE IN SPITE OF THE THINGS THAT HE TOLD US.

THE COURT: I'M GOING TO DENY THE MOTION, AND WE WILL SEE WHAT HAS BEEN SUBMITTED TO THE JURY, AND DENY THE MISTRIAL.

MY BASIS OF THAT IS IT WAS A FAIR COMMENT, AND I DO NOT BELIEVE IT WAS SUCH A COMMENT THAT WOULD CAUSE PREJUDICE TO THE JURY AND RESULT IN AN IMPROPER SORT OF--

MR. BLAYLOCK: YOUR HONOR, COUNSEL STILL HAS NOT TAKEN THEIR EXCEPTIONS TO THE COURT'S RULING WITH REGARD TO THE 29TH, THE EVENTS OF THE 29TH.

THE COURT: THAT IS CORRECT.

THE COURT: WHY DON'T WE--

MR. YOUNGBERG: BRIEFLY, JUDGE--

THE COURT: JUST A MINUTE. THIS IS SOMETHING WE'LL HAVE TO DO TONIGHT. LET'S ALLOW WHATEVER BREAK THE REPORTER NEEDS AND THEN BE AS QUICK AS WE CAN

(RECESS TAKEN.)

MR. YOUNGBERG: OKAY. I WANT PLACED ON THE RECORD OUR OBJECTION TO ALLOWING THE PROSECUTOR TO ELICIT TESTIMONY ABOUT THE BURGLARY THAT TOOK PLACE THE NIGHT BEFORE THE CHARGED BURGLARY. I WOULD MAKE THAT MOTION ON A STATE VERSUS COX, DEALING WITH BAD ACTS, PRIOR BAD ACTS BY DEFENDANTS. IN IN THAT CASE THEY ALSO CITED, FETHESTON, THAT'S A UTAH CASE, 781, 426.

THEY STATE THAT ALTHOUGH-- LET ME JUST-- THAT PRIOR BAD-ACT EVIDENCE NEEDS TO ESTABLISH A MATERIAL ELEMENT OF THE CRIME THAT'S ACTUALLY CHARGED. AND THEREFORE BE DIRECTLY PROBATIVE OF A DISPUTED ISSUE BEFORE IT COULD BE ADMISSIBLE DUE TO ITS INHERENTLY

PREJUDICIAL NATURE. AND I SUBMIT IT ON THAT BASIS, JUDGE.

THE COURT: MR. ANDERSON?

MR. ANDERSON: YOUR HONOR, I ARGUE THIS WAS INADMISSIBLE,. I ARGUE IT WAS OVERLY PREJUDICIAL FOR MR. JENNINGS, IN FACT THAT THERE WAS NOTHING CONNECTING HIM WITH THE NIGHT BEFORE AND HIS RELATIONSHIP TO THE MARCH 30TH WAS IN ESSENSE ONE STEP REMOVED EVEN FROM MR. SPRAGUE, AND IT WOULD FORCE TO US TRY TO PUT ON ALIBI TESTIMONY AND DEFEND TWO CASES AT THE SAME TIME, WHICH IN FACT WE DID ATTEMPT TO DO.

THE COURT: MR. BLAYLOCK, YOUR RESPONSE?

MR. BLAYLOCK: JUST ONE COMMENT THAT AS THIS DEVELOPED I PROVIDED COUNSEL BOTH FOR MR. JENNINGS AND MR. SPRAGUE TO PRESENT EVIDENCE THAT THEY FOR SOME REASON OR ANOTHER COULD NOT HAVE BEEN THERE OR COMMITTED THAT CRIME EITHER BECAUSE THE BOLT CUTTERS WERE NOT AVAILABLE THE NIGHT BEFORE OR BECAUSE MR. JENNINGS WAS ASLEEP AT HOME IN HIS MOTHER'S HOUSE. SO ACTUALLY I PROVIDED THEM SOME FURTHER DEFENSE THAT THEY DID NOT HAVE PREVIOUSLY.

MR. ANDERSON: YOUR HONOR, I OBJECT TO THE CHARACTERIZATION THAT THE STATE WAS DOING US, SOMEHOW, A FAVOR BY BRINGING IN THE PRIOR BURGLARY TO EVEN ALLOW MORE MATERIAL FOR ALIBI. I DON'T THINK THAT'S AN APPROPRIATE RESPONSE AND I DON'T THINK THAT'S WHAT

MR. BLAYLOCK ARGUED PREVIOUSLY.

THE COURT: WELL, I'M GOING TO RULE NOW. I HAVE ALREADY RULED, BUT I'M GOING TO SAY ON THE RECORD, FIRST OF ALL I DON'T THINK WE'RE TALKING ABOUT PRIOR BAD ACTS BECAUSE THERE IS NO INDICATION THAT I CAN THINK-- IT WAS A COMPLETE DENIAL THAT THE DEFENDANTS HAD ANYTHING TO DO WITH THE ACTIVITIES OF THE 29TH.

THE CIRCUMSTANCES AND THE PATTERN OF THOSE ACTIVITIES SEEM TO ME TO BE RELEVANT IN ALLOWING A FULL DEVELOPMENT OF THE CASE, AND TO EXCLUDE THAT WOULD BE TO ELIMINATE THAT OPPORTUNITY. IN ADDITION TO THAT, IT WOULD SEEM TO ME THAT THERE WAS A RELATIONSHIP THAT COULD BE ESTABLISHED BETWEEN THE EARLIER ACTIVITY AND THE PRESENT ACTIVITY THAT HAD SOME PROBATIVE SIGNIFICANCE TO THE ALLEGED ACTIVITIES OF DEFENDANTS ON THE 30TH.

AND FINALLY, IN LOOKING AT THE WAY IN WHICH THE EFFECT OF THAT EVIDENCE WAS EITHER PREJUDICIAL AS AGAINST PROBATIVE, I'M CERTAIN THAT MR. BLAYLOCK DIDN'T DO IT INTENTIONALLY, BUT MY OWN READING OF THE EVIDENCE WAS THAT IT PROBABLY HELPED THE DEFENDANTS MORE THAN IT HURT THEM, SIMPLY BECAUSE THE CREDIBILITY OF THEIR ACTIVITIES THE NIGHT BEFORE, PARTICULARLY WITH RESPECT TO MR. JENNINGS, WOULD HAVE MADE IT MORE DIFFICULT TO BELIEVE THAT HE HAD ANYTHING TO DO WITH THE ACTIVITIES OF THE NIGHT AFTER THAT.

I THINK THAT'S WHAT MR. BLAYLOCK, I THINK, IS SAYING. I DON'T THINK HE SAID HE DID IT INTENTIONALLY, BUT THAT'S KIND OF HOW THAT CAME OUT. SO I DON'T THINK THERE'S A PREJUDICE AS A RESULT.

MR. BLAYLOCK: I WASN'T SAYING THAT. I DID THAT INTENTIONALLY. I STATED THAT AS THE EVIDENCE WAS DEVELOPED, IT PROVIDED THEM MORE DEFENSES.

THE COURT: I BELIEVE THE RECORD HAS BEEN MADE. YOU PRESERVED YOUR OBJECTION.

I THINK WE SHOULD ALLOW-- THE COURT WOULD NOTE THAT IT'S BEEN A LONG NIGHT AND WE HAVE HAD SEVERAL LONG NIGHTS FOR THE LAST SEVERAL WEEKS AND IT HAS BEEN A BURDON ON EVERYBODY.

MR. BLAYLOCK: THANK YOU, YOUR HONOR.

THE COURT: LET ME JUST SAY PERSONALLY I THINK COUNSEL HAVE COMPORTED THEMSELVES WITH PROFESSIONALISM AND THAT'S SOMETHING THAT IS HELD VERY HIGHLY IN THE COURT'S MIND. I APPRECIATE THE FACT THAT THIS CASE YOU DID, YOU FOUGHT HARD AND YOU DISPLAYED YOUR ZEALOUS INTEREST IN YOUR CLIENTS. AND YOU DID IT IN A WAY THAT I THOUGHT YOU DID YOURSELVES PROUD.

MR. BLAYLOCK: THANK YOU.

MR. YOUNGBERG: THANK YOU, YOUR HONOR.

MR. ANDERSON: THANK YOU, YOUR HONOR.

(EVENING RECESS.)

Addendum J

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900791

JACK CHRISTOPHER JENNINGS,

DEFENDANT,

STATE OF UTAH,

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JEFFREY SPRAGUE,

DEFENDANT.

BEFORE THE HONORABLE WILLIAM B. BOHLING, JUDGE

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MR. BLAYLOCK ARGUED PREVIOUSLY.

THE COURT: WELL, I'M GOING TO RULE NOW. I HAVE ALREADY RULED, BUT I'M GOING TO SAY ON THE RECORD, FIRST OF ALL I DON'T THINK WE'RE TALKING ABOUT PRIOR BAD ACTS BECAUSE THERE IS NO INDICATION THAT I CAN THINK-- IT WAS A COMPLETE DENIAL THAT THE DEFENDANTS HAD ANYTHING TO DO WITH THE ACTIVITIES OF THE 29TH.

THE CIRCUMSTANCES AND THE PATTERN OF THOSE ACTIVITIES SEEM TO ME TO BE RELEVANT IN ALLOWING A FULL DEVELOPMENT OF THE CASE, AND TO EXCLUDE THAT WOULD BE TO ELIMINATE THAT OPPORTUNITY. IN ADDITION TO THAT, IT WOULD SEEM TO ME THAT THERE WAS A RELATIONSHIP THAT COULD BE ESTABLISHED BETWEEN THE EARLIER ACTIVITY AND THE PRESENT ACTIVITY THAT HAD SOME PROBATIVE SIGNIFICANCE TO THE ALLEGED ACTIVITIES OF DEFENDANTS ON THE 30TH.

AND FINALLY, IN LOOKING AT THE WAY IN WHICH THE EFFECT OF THAT EVIDENCE WAS EITHER PREJUDICIAL AS AGAINST PROBATIVE, I'M CERTAIN THAT MR. BLAYLOCK DIDN'T DO IT INTENTIONALLY, BUT MY OWN READING OF THE EVIDENCE WAS THAT IT PROBABLY HELPED THE DEFENDANTS MORE THAN IT HURT THEM, SIMPLY BECAUSE THE CREDIBILITY OF THEIR ACTIVITIES THE NIGHT BEFORE, PARTICULARLY WITH RESPECT TO MR. JENNINGS, WOULD HAVE MADE IT MORE DIFFICULT TO BELIEVE THAT HE HAD ANYTHING TO DO WITH THE ACTIVITIES OF THE NIGHT AFTER THAT.

I THINK THAT'S WHAT MR. BLAYLOCK, I THINK, IS SAYING. I DON'T THINK HE SAID HE DID IT INTENTIONALLY, BUT THAT'S KIND OF HOW THAT CAME OUT. SO I DON'T THINK THERE'S A PREJUDICE AS A RESULT.

MR. BLAYLOCK: I WASN'T SAYING THAT. I DID THAT INTENTIONALLY. I STATED THAT AS THE EVIDENCE WAS DEVELOPED, IT PROVIDED THEM MORE DEFENSES.

THE COURT: I BELIEVE THE RECORD HAS BEEN MADE. YOU PRESERVED YOUR OBJECTION.

I THINK WE SHOULD ALLOW-- THE COURT WOULD NOTE THAT IT'S BEEN A LONG NIGHT AND WE HAVE HAD SEVERAL LONG NIGHTS FOR THE LAST SEVERAL WEEKS AND IT HAS BEEN A BURDON ON EVERYBODY.

MR. BLAYLOCK: THANK YOU, YOUR HONOR.

THE COURT: LET ME JUST SAY PERSONALLY I THINK COUNSEL HAVE COMPORTED THEMSELVES WITH PROFESSIONALISM AND THAT'S SOMETHING THAT IS HELD VERY HIGHLY IN THE COURT'S MIND. I APPRECIATE THE FACT THAT THIS CASE YOU DID, YOU FOUGHT HARD AND YOU DISPLAYED YOUR ZEALOUS INTEREST IN YOUR CLIENTS. AND YOU DID IT IN A WAY THAT I THOUGHT YOU DID YOURSELVES PROUD.

MR. BLAYLOCK: THANK YOU.

MR. YOUNGBERG: THANK YOU, YOUR HONOR.

MR. ANDERSON: THANK YOU, YOUR HONOR.

(EVENING RECESS.)

Addendum K

ORIGINAL

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900791

JACK CHRISTOPHER JENNINGS,

DEFENDANT,

STATE OF UTAH,

PLAINTIFF,

V. CRIMINAL NO. 951900792

JEFFREY SPRAGUE,

DEFENDANT.

BEFORE THE HONORABLE WILLIAM B. BOHLING, JUDGE

NOVEMBER 15, 1995
AFTERNOON SESSION

REPORTER'S TRANSCRIPT OF ON APPEAL

960154-CA 000090

OR DO ANYTHING WITH REGARDS TO HIS PARTICULAR UNIT.

AND CINDY LOU BEARD, CINDY WAS QUITE UPSET AND SHE CONVEYED THAT TO YOU. UNIT 711. THEY WERE THERE THE NIGHT BEFORE, PUT A NEW LOCK ON. SHE COMES BACK THE NEXT NIGHT AND THESE HEIRLOOMS, THIS CRIB THAT WAS HANDMADE WAS GONE. AND SHE SAID SHE CERTAINLY DIDN'T GIVE ANYONE PERMISSION TO BE THERE AND CUT THE LOCK OFF AND TAKE THOSE THINGS OUT OF THE THERE. SHE FELT-- SHE WAS VERY ANGRY ABOUT IT. THE FIRST NIGHT SHE WAS UPSET AND THE NEXT NIGHT SHE WAS VERY ANGRY.

POSSESSION OF INSTRUMENT FOR BURGLARY, THEFT, ARE STATE'S EXHIBIT NUMBER 10, STATE'S EXHIBIT NUMBER 15, THESE BOLT CUTTERS, THAT NIGHT. HERE'S A PICTURE OF WHERE THEY WERE IN THE JEEP.

AND WHAT WERE THOSE USED FOR? WELL, YOU HEARD THE TESTIMONY FROM BOB BRINKMAN. HE SAID THAT STATE'S EXHIBIT 7, IF I CAN FIND THAT. EXCUSE ME. HERE IT IS. STATE'S EXHIBIT 7 WAS RECEIVED BY HIM IN THE LABORATORY AND HE TESTED THAT. AND THE WAY HE SAID HE TESTED THAT WAS THAT HE USED LEAD SO THAT IT WOULD GIVE A NICE CLEAN CUT, WOULDN'T CHANGE THE TYPE OF EDGE THAT THE BOLT CUTTERS HAVE HERE. AND HE SAID HE ACTUALLY PUT A MARK ON THERE, AN ARROW, THAT SHOWED THE AREA HE TESTED, AND WHAT DID HE COME UP WITH? EXHIBIT NUMBER 34, PERFECT MATCH.

HE SAID, THAT'S KIND OF UNUSUAL, IF THERE ARE A